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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

GOYA FOODS, INC., v. ULPIANO UNANUE-CASAL a/k/a/ CHARLES UNANUE, LILIANE UNANUE AND KALIF TRADING,INC.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The manner in which a district court wields its contempt power is a process fraught with the potential for misuse, and requires vigilant oversight by all higher courts. In this matter, the conduct of the district court in its application of that power calls for the exercise of this Court's supervisory powers in light of the questions presented:

1. Whether a district court's power to enforce a judgment includes the power to issue orders for the arrest for contempt, and other relief, when it is without jurisdiction over the person against whom such orders were entered and the underlying judgment is unenforceable.

2. Whether the procedures followed by the district court in issuing the order for arrest and for contempt met the requirements of due process.

3. Whether the District Court Judge should have recused himself from this matter pursuant to 28 U.S.C.A. § 455(a), and whether that issue may be first raised upon appeal.

4. Whether the provisional remedy orders upon which the order to show cause was based remained extant after the final judgment or were merged in the final judgment, and whether the final judgment afforded Petitioner sufficient notice that it gives rise to any basis for any finding of contempt and for an order for incarceration in Puerto Rico without bail and without a scheduled hearing as a consequence of the sale by Petitioner of her shares of stock which she exclusively

owned and which were not clearly encompassed in the final judgment.

5. Whether the United States Court of Appeals for the First Circuit properly applied the Fugitive Disentitlement Doctrine in light of this Court's opinion in Degen v. United States, 517 U.S. 820, 823, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996).

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioner Liliane Unanue ("Liliane"), Charles Unanue, ("Charles"), Kalif Trading, Inc. ("Kalif Trading"), and respondent Goya Foods, Inc. ("Goya").

Other entities appearing in this action in response to the district court's order to show cause were Ira Leon Rennert, Wallack Management Co., Inc., and 625 Park Corporation.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

LEGAL ARGUMENT

POINT I
CERTIORARI SHOULD BE GRANTED TO ASSURE THAT THE COURTS DO NOT ACT WITHOUT JURISDICTION 10

POINT II
THE PROCEDURES FOLLOWED BY THE DISTRICT COURT IN ISSUING THE ORDER FOR ARREST FOR CONTEMPT DID NOT MEET THE REQUIREMENTS OF DUE PROCESS 13

POINT III
THE DISTRICT COURT JUDGE SHOULD HAVE RECUSED HIMSELF FROM THIS MATTER PURSUANT TO 28 U.S.C.A. § 455(A), AND THAT ISSUE MAY BE FIRST RAISED UPON APPEAL 17

POINT IV
THE PROVISIONAL REMEDY ORDERS DID NOT REMAIN EXTANT AFTER THE FINAL JUDGMENT, AND THE FINAL JUDGMENT DID NOT AFFORD LILIANE UNANUE SUFFICIENT NOTICE THAT IT GAVE RISE TO ANY BASIS FOR A FINDING OF CONTEMPT FOR THE ACTION SHE TOOK. 21

POINT V
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT MISAPPLIED THE FUGITIVE DISENTITLEMENT DOCTRINE 25

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Cases

Castro v. New York City Board of Education, 787 F. Supp. 26, 29 (D.P.R. 1992), affirmed, 972 F.2d 337 (1st. Cir. 1992), cert. denied, 506 U.S. 1061, 113 S.Ct. 998, 122 L.Ed.2d 149 (1993) 11

Consumer Union of the United States, Inc. v. Consumer Products Safety Commission, 561 F.2d 349 (D.C. Cir. 1977) 24

Cypress Barn, Inc. v. Western Electric Co., 812 F.2d 1363 (11th Cir. 1987) 24

Degen v. United States, 517 U.S. 820, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996) 26, 29

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938) 24

Escude Cruz v. Ortho Pharmaceutical Corp., 619 F. 2d 902 (1st Cir. 1980) 11

Ex parte Marquez Estrella, 128 D.P.R. 243 (P.R. 1991). 12, 20

Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) 12

Heasley v. United States, 312 F.2d 641 8th Cir. 1963) 24

In re Leonard Jaques, 761 F. 2d 302 (6th Cir. 1985), cert. denied, 475 U.S. 1044, 106 S.Ct. 1259, 89 L.Ed.2d 570 (1986) 13

In re Murray Stewart, 571 F. 2d 958 (5th Cir. 1978) 13

International Longshoremens' Assoc. Local 1219 v. Philadelphia Marine Trades Assoc., 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967) 22

International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 11

International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) 14

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) 19

Matter of Moscoso Villaronga, 111 B.R. 13 (Bkrptcy, D.P.R. 1989) 21, 22, 23, 24

Noli v. Commissioner of Internal Revenue, 860 F.2d 1521 (9th Cir. 1988) 21

Parker v. United States, 126 F.2d 370 (1st. Cir. 1942) 24

Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415 (Fed. Cir. 1989), cert. denied, 490 U.S. 1047, 109 S.Ct. 1956, 104 L.Ed.2d 425 (1989) 20

Quadrel Leasing de Puerto Rico v. Carlos A. Rivera, Inc., 130 B.R. 377 (Bkrpty. D.P.R. 1991) 23

Securities and Exchange Commission v. Kimmes, 759 F. Supp. 430 (N.D. Ill 1991) 15

Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) 14

United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F. 2d 1080 (1st Cir. 1992) 10

United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F.2d 1080 (1st Cir. 1992) 29

United States v. Antar, 53 F. 3d 568 (3rd Cir. 1995) 18, 19, 20

United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997)... 28

United States v. Lopez, 944 F. 2d 33 (1st Cir. 1991)..... 18

United States v. Miranne, 688 F. 2d 980, 985 (5th Cir. 1982), cert. denied, 459 U.S. 1109, 103 S.Ct. 736, 74 L.Ed.2d 959 (1983) 19

United States v. Perry, 116 F. 3d 952 (1st Cir. 1997) 14

United States v. Winter, 70 F. 3d 655 (1st Cir. 1995), cert. denied, 517 U.S. 1126, 116 S.Ct. 1366, 134 L.Ed.2d 532 (1996) 13, 14

Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), cert. denied, __ U.S. __, 121 S.Ct. 1113, 148 L.Ed.2d 982 (2001) 26, 29

Webbe v. McGhie Land Title Company, 549 F. 2d 1358 (10th Cir. 1977) 18, 19, 20

Constitutional Provisions

U.S. Const. amendment V 2

Statutes

28 U.S.C. § 1254 2

28 U.S.C.A. § 455(a) 3, 18, 20

Rules

Fed. R. Civ. P. 64 ..... 21, 23

Fed. R. Crim. P. 42 14

Puerto Rico Rules of Civil Procedure, Rule 56 ..... 21, 23

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Petition For A Writ of Certiorari To The United States Court Of Appeals For The First Circuit

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Petitioner, Liliane Unanue, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit issued on December 27, 2001, which was also the subject of a June 4, 2002 denial of a petition for rehearing en banc and for panel rehearing.

OPINIONS BELOW

The judgment of the United States District Court for the District of Puerto Rico was dated October 31, 1997 as was that Court's opinion reported at 982 F. Supp. 103. A

subsequent amended judgment was rendered on December 14, 1998. An appeal from that judgment resulted in the November 28, 2000 judgment and order of the United States Court of Appeals for the First Circuit, an "errata" thereto on December 20, 2000, and an Order of January 29, 2001. That appeal is reported at 233 F.3d 38.

On October 31, 2000, while the Petitioner's appeal was pending, the United Sates District Court for the District of Puerto Rico issued a Warrant for the Arrest of the Petitioner premised upon an alleged contempt of court. That, in turn, was appealed and led to the December 27, 2001 judgment and opinion, reported at 275 F.3d 124, which is the subject of this Petition for Certiorari. Petitioner's motion for rehearing en banc and for panel rehearing was denied on June 4, 2002.

JURISDICTION

On December 27, 2001, the United States Court of Appeals for the First Circuit issued its opinion and its judgment in this matter. Petitioner's petition for rehearing was denied on June 4, 2002.

The jurisdiction of this Court to review the opinion and judgement of the United States Court of Appeals for the First Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

> on a present or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offences to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C.A. § 455(a):

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

This case arises from a dispute among members of the family that founded Goya Foods, Inc. ("Goya"). Prior to 1969, Charles (Liliane's husband), his father and his brothers were the shareholders, officers and directors of Goya and of the other business entities comprising the international conglomerate of family owned enterprises known as the "Goya Companies".

Charles' father and brothers ousted him from his corporate positions in 1969 when he felt compelled to rectify and disclose certain accounting practices relating to the underpayment of taxes

After the ouster, extensive litigation ensued which was first settled by an agreement dated June 9, 1972, and

subsequent litigation was settled again in an Agreement dated July 31, 1974 ("1974 Amendment"), both of which were signed in Puerto Rico. From 1969 to the present, with the exception of that period of time in which Charles had use of the settlement payments that he received, he was exclusively supported by his wife, Liliane.

One of the terms of the 1974 Amendment was that Charles would waive his future inheritance from his father (Prudencio Unanue), a provision which was illegal and unenforceable under the laws of Puerto Rico where Prudencio had been living for several years and continued to live until his death in 1976, and where he was a citizen pursuant to 48 U.S.C. §733a. The waiver of inheritance was also inconsequential because such property as was acquired during marriage belonged to the conjugal partnership (a *sui generis* legal entity under the Civil Code of Puerto Rico) formed by the marriage of Charles' father and mother, and not to Prudencio individually.

However, even before the agreements settling the dispute with Charles were signed, Prudencio took from the conjugal partnership the shares of voting stock in Goya and placed them in a trust. This was done without any indication whatsoever of the knowledge or consent of Carolina. The effect of this was not only to deny her what would become her share upon the death of Prudencio, but to also circumvent the unwaivable right of both Charles and Prudencio's illegitimate child to their inheritances.

When Charles inquired about the ownership of the conjugal partnership's shares in the Goya companies and mentioned the illegality of the purported waiver of inheritance from his father, his brothers commenced an action in New Jersey seeking a declaratory judgment that Charles was not entitled to inherit from his father. Other litigation, including an action in Puerto Rico by Charles seeking his inheritances

from his parents and aunt, also ensued. Charlie's adversaries maneuvered the case to New Jersey by claiming Prudencio was domiciled there. Trial occurred over a span of 170 days.

In 1990, when Goya's attorney's were representing Charlie's former wife and attached Liliane's properties, Charles was forced to commence bankruptcy proceedings. As a result, Charles was substituted out of the New Jersey action in 1991 and the bankruptcy trustee succeeded him as the only defendant in that case. However, the bankruptcy trustee did not defend that action. Liliane was never a party to that action.

The Superior Court of New Jersey, among other things, ordered: (1) that Charles Unanue (who was no longer party to the action) and his bankruptcy estate had no right to receive any assets from Prudencio's estate or from the trust to which the voting shares of Goya were diverted; (2) that the 1972 Agreement and the 1974 Amendment (with respect to which 11 of the 12 parties were not even before the court) were valid and enforceable; and (3) that judgment be entered against Charles on his claims.

Even though the only defendant in the New Jersey proceeding was Charles' bankruptcy estate, on February 23, 1995, judgment was also entered against Charles individually and in favor of Goya, for $6.9 million, most of which was for legal fees that Goya paid to lawyers for the personal legal expenses of Charles' brothers and their issue.

Seven months later, the bankruptcy case and the Adversary Proceeding in which Goya had sought to attach Liliane's property by falsely claiming that Charles had made fraudulent transfers were dismissed when Goya failed to present its New Jersey judgment to the bankruptcy court.

Two months after the dismissal, Goya instituted the present action in Puerto Rico against Charles, Liliane, and Kalif Trading without domesticating the New Jersey judgment in Puerto Rico as required by the laws of Puerto Rico. The action was commenced by the issuance of *ex parte* orders purporting to restrain the disposition of a condominium in Puerto Rico owned by Kalif, the shares in a cooperative in New York owned by Liliane, and property in Spain and France owned by Liliane, all of which Goya again falsely claimed were the result of fraudulent conveyances made by Charles up to twenty years earlier.

Liliane, a resident and domiciliary of New York since 1959, moved to dismiss for lack of personal jurisdiction on the grounds that she did not have contacts with Puerto Rico which could sustain the exercise of jurisdiction over her, or in the alternative, to transfer the matter to the Southern District of New York. Charles made a similar motion, as his domicile and residence was New York at the time this suit was commenced. The district court denied the motions, after stating that Charles had transferred one of the Puerto Rico condominiums to a corporation; but the proofs at trial showed that the condominium unit was never owned by Charles.

At trial, Goya conceded that it did not have proof of any fraudulent conveyances, and the district court made no finding of any such conveyance from Charles to Liliane. As to Goya's other asserted grounds for liability, the district court's decision imposed liability against Liliane on the basis that Liliane was the alter ego of Charles. On appeal, the United States Court of Appeals for the First Circuit rejected that ground for liability.

Remarkably, rather than reversing the judgment, the United States Court of Appeals for the First Circuit, without notice to the defendants nor the benefit of any briefing or argument by them on the issue, raised on its own a theory of

constructive trust and affirmed the judgment on that basis. A subsequent petition for certiorari was not granted.

The final judgment entered by the district court "recognize[ed] plaintiff's right to execute judgment over the properties known as the Sutton House apartment in New York City and any residence registered in [Liliane's] name including the Fuengirola, Malaga, Spain villa and the Paris Apartment". It was rendered regardless of Goya's admission at trial that it had not found any evidence to support any of its claims of "fraudulent transfers. The registered property deeds which were in evidence, were proof that Liliane had purchased all her real property, from third parties, decades earlier, without any economic assistance from Charles and at a time that Charles had no funds or liquid assets.

The shares which Liliane owned in a New York cooperative (625 Park Corporation) were *not* specifically identified or included in that judgment. Indeed, the district court's opinion found that those shares were acquired by Liliane with the proceeds of a loan which she had obtained from a commercial bank in 1976.

Years later, while the appeal to the First Circuit was pending, Liliane sold her shares in 625 Park Corporation. Upon learning of this, on October 20, 2000, Goya had the district court issue under seal an ex parte order to show cause. Although this order specifically stated that it was serving as process and that Liliane was to appear in Puerto Rico on October 31, 2000 to show cause, it was never personally served upon Liliane. Charles was served in New York with the order only one week before the return date in Puerto Rico. The order to show cause threatened Liliane with arrest if she did not promptly appear in Puerto Rico prepared to turn over $4.6 million dollars. It thus became imperative that Liliane have a lawyer to represent her.

Even though she was not personally served, and without waiving the lack of jurisdiction, Liliane (as well as Charles) had lawyers in Puerto Rico make a timely appearance and ask for a continuance to enable them to become fully retained and sufficiently familiar with the case to effectively represent Liliane and Charles. The request was denied. After thus denying Liliane and Charles the right and benefit of counsel, the district court found them both to be in contempt of court based upon the provisional remedy orders that were issued at the outset of the case purporting to freeze many millions of dollars of Liliane's assets upon the posting of a relatively miniscule $10,000 bond. Warrants were issued for their arrest and for their incarceration without bail, in Puerto Rico.

The October 31, 2000 arrest warrant, although stating that it is for civil contempt, states that Liliane is to be held without bail until such time as the district court holds a hearing, and contains no provision whatsoever whereby she has the ability to obtain a release from incarceration. A similar warrant was issued against Charles, even though he did not own or sell the shares. The district court also issued other orders, including the appointment of a special master to liquidate the property of Kalif Tr ıding. That property was subsequently auctioned, and purchased by the only bidder, Goya, for less than half of its fair market value of $1,500,000.

In determining the appeal that was pending when the cooperative shares were sold, the First Circuit held that the language in the district court judgment reaching any "residence registered to [Liliane's] name" was too broad to be sustained. The opinion of the First Circuit as issued on November 28, 2000 modified the judgment to limit Goya's right of execution to the "identified real property held in Liliane's name", which it had specifically identified as "the three named properties in New York, Paris and Malaga." Although the district court was clearly aware of Liliane's ownership of the 625 Park Corporation cooperative shares, the

only New York "property" specifically and clearly identified in the district court's judgment was the Sutton House apartment. The judgment itself provided:

> Regarding Liliane Unanue, the Court recognizes plaintiff's right to execute judgment over the properties known as the Sutton House apartment in New York City, and any residence registered in her name, including the Fuengirola, Malaga, Spain villa, and the Paris Apartment.

Liliane, filing *pro se*, moved before the district court to have the arrest warrant vacated, and to also have the order to show cause and subsequent orders that had been entered by the district court vacated as well. After she sent her motion to the district court for filing, an errata was issued from the First Circuit that amended the First Circuit's opinion and judgment. That amendment consisted of, *inter alia*, a revision to the opinion such that it no longer stated that the judgment was against "the three named properties in New York, Paris, and Malaga" but instead was against the "properties in New York, Paris, and Malaga mentioned above." This resulted in a reinterpretation of the district court judgment from being applicable to the three specifically named properties in the judgment (i.e., the Sutton House apartment, the Paris apartment, and the Malaga home) to being applicable to any properties mentioned in the court's opinion (i.e., the Sutton House apartment, the 625 Park Corporation cooperative shares, the Paris apartment, and the Malaga home). Notwithstanding that such amendment occurred *after* the contempt had been found, the district court denied Liliane's motion to vacate without furnishing any opinion or statement of reason.

On March 19, 2001, Liliane filed an appeal from the

denial of her motion to vacate. Goya, asserting that Liliane fled the country, urged that her appeal should be dismissed. On December 27, 2001, the First Circuit issued its opinion in which it dismissed the appeals based upon the fugitive disentitlement doctrine. The First Circuit also imposed costs upon Liliane's counsel.

Liliane petitioned for rehearing en banc and for a panel rehearing. That petition was denied on June 4, 2002.

LEGAL ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO ASSURE THAT THE COURTS DO NOT ACT WITHOUT JURISDICTION

The district court lacked personal jurisdiction over Liliane, yet has proceeded to hold her in contempt. Lack of jurisdiction is a basis for the appeal and reversal of a contempt order. See, United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F. 2d 1080, 1098 (1st Cir. 1992). Hence, the contempt order should have been reversed for lack of jurisdiction.

Liliane had been a citizen and domiciliary of the State of New York since 1959 and did not own any real property or have minimal contacts in Puerto Rico, or New Jersey. Liliane and Charles filed sworn statements which remain uncontroverted that at the time of Goya's filing of the law suit and thereafter they did not have minimal contacts with Puerto Rico, so that the district Court could not have had *in personam* jurisdiction over them.

It is well settled that there must exist sufficient

contacts between the party and the forum so that the assertion of jurisdiction over the party does not offend traditional notions of fair play and substantial justice. *See*, e.g., International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *See also*, Escude Cruz v. Ortho Pharmaceutical Corp., 619 F. 2d 902 (1st Cir. 1980). First, the non-resident must act or consummate a transaction within the forum. Escude Cruz, supra at 904. Second, the cause of action must arise out of the defendant's action within the forum state. Id. at 905. Finally, the activity linking the defendant, the cause of action, and the forum must be substantial enough to meet the due process requirement of "fair play and substantial justice." Castro v. New York City Board of Education, 787 F. Supp. 26, 29 (D.P.R. 1992), affirmed, 972 F.2d 337 (1st. Cir. 1992), cert. denied, 506 U.S. 1061, 113 S.Ct. 998, 122 L.Ed.2d 149 (1993).

The law is clear that not any act of a defendant in the forum state will give rise to jurisdiction. There must be some rational nexus between the plaintiff's claim and the activity of the non-resident defendant before it is constitutionally permissible to hold him or her amenable to suit in the forum state. Escude Cruz, supra at 905. The only alleged contact upon which the court below based its assertion of jurisdiction (i.e., the alleged transfer of an apartment to Kalif by *Charles* more than ten years before the action was commenced) was shown at trial not to have occurred. Even if it had occurred, it would not have been a sufficient contact of *Liliane* with Puerto Rico. Thus, the cause of action did not arise out of Liliane's actions in the forum state.

Hence, the district court was, and continues to be without jurisdiction over Liliane (or Charles), and the orders below (and the entire proceedings) should have been vacated and dismissed for lack of any jurisdiction whatsoever.

The district court also lacked jurisdiction in the present matter because of the continuing failure of the

underlying New Jersey judgment to have undergone the exequatur proceedings required by Ex parte Marquez Estrella, 128 D.P.R. 243 (P.R. 1991). Until it has undergone that process, a foreign or state court judgment cannot be enforced in Puerto Rico in any manner. Id. The district court was not free to disregard this requirement. See, Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). The failure to first have the New Jersey judgment domesticated through exequatur proceedings was more than a mere procedural point; it is a matter of the substantive deficiencies underlying the New Jersey judgment, because the process of exequatur affords the parties against whom the judgment is asserted the opportunity and right to contest the jurisdiction of the court that rendered the judgment and any lack of due process before that court. Id. The New Jersey judgment could not be domesticated because it was the product of a denial of due process in that it was issued against Charles personally even though he was not a party to that action.

Being thus non-existent in Puerto Rico by virtue of the absence of domestication, there was nothing (no case, no controversy, no judgment) that the district court could have jurisdiction over. In other words, there was no subject matter for the litigation over which the district court could have jurisdiction, during the almost seven years of arduous and costly litigation.

With the district court being still engaged in on-going proceedings to enforce the New Jersey judgment, both the absence of *in personam* jurisdiction over Liliane (and Charles) and the failure of the New Jersey judgment to have been domesticated, are timely and meritorious grounds requiring the vacation and reversal of the orders which are the subject of the appeal, and which existed and continue to exist.

POINT II

THE PROCEDURES FOLLOWED BY THE DISTRICT COURT IN ISSUING THE ORDER FOR ARREST FOR CONTEMPT DID NOT MEET THE REQUIREMENTS OF DUE PROCESS

Although the warrant for Liliane's arrest states that it was issued for civil contempt, the nature of her alleged actions and the district court's punishment reveal that it was issued for criminal contempt, and done without affording Liliane the well-settled due process and other rights that must be given to persons accused of criminal contempt.

A district court's reference to a contempt as being civil is not conclusive on appeal, and is just one factor to consider in determining whether the alleged contempt is civil or criminal in nature. In re Murray Stewart, 571 F. 2d 958 (5th Cir. 1978); In re Leonard Jaques, 761 F. 2d 302 (6th Cir. 1985), cert. denied, 475 U.S. 1044, 106 S.Ct. 1259, 89 L.Ed.2d 570 (1986). Because of the frequency with which the two types of contempt are confused, it is important to consider all factors relating to those two different forms. In re Jaques, supra at 305. The determination of whether a contempt order is civil or criminal is a question of law, and the trial court's characterization of the sanction is not binding upon review. United States v. Winter, 70 F. 3d 655, 660 (1st Cir. 1995), cert. denied, 517 U.S. 1126, 116 S.Ct. 1366, 134 L.Ed.2d 532 (1996).

As set forth in Winter, supra, the distinction between civil and criminal contempt is important because different procedures are required for the different forms. Id. Civil contempt sanctions may be imposed if mere notice and an opportunity to be heard are given to the alleged contemnor. Id. There are additional constitutional protections in the case of criminal contempt. Id. These protections include more

than notice and a hearing; they also include the right to counsel, right to bail, proof beyond a reasonable doubt, a presumption of innocence, a privilege against self-incrimination, and in some instances, not only a right to a jury trial, but the right to a hearing before another judge. Fed. R. Crim. P. 42.

A court must examine the character of the order itself to determine whether a contempt is civil or criminal. Winter, 70 F. 3d at 662. The critical feature that determines whether the remedy is civil is whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. Id. If the contemnor is able to purge the contempt, it is civil. Punishment for criminal contempt, on the other hand, is punitive and imposed to vindicate the authority of the court, i.e., purging is neither permitted nor possible. United States v. Perry, 116 F. 3d 952, 956 (1st Cir. 1997). "When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. The defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense." International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 829, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). Indeed, the very justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order. Shillitani v. United States, 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966), *citing*, Maggio v. Zeitz, 333 U.S. 56, 76 (1948).

Here, the district court's finding of contempt is one of criminal contempt because (i) it ordered Liliane's imprisonment in October 2000 as a punishment for conduct that occurred two years earlier (i.e., the sale of the 625 Park Corporation shares), and thus was intended to be not a coercive sanction but rather purely a punishment for violating a court order which could no longer be complied with as the act of selling the shares could not be undone; (ii) the order for

arrest and incarceration was without bail and did not provide any other means by which Liliane could secure her release from prison; (iii) the application by Goya sought criminal contempt and the contempt proceedings were commenced with the issuance of separate process; and (iv) the district court called for Liliane's extradition should she be out of the country.

The penalty imposed by the district court on Liliane was unconditional and not subject to being lifted by her. The alleged act which gave rise to the contempt finding, i.e., the alleged sale of the 625 Park Corporation shares by Liliane, could not be undone in response to the contempt determination. *See*, Securities and Exchange Commission v. Kimmes, 759 F. Supp. 430 (N.D. Ill 1991) (contempt was of a criminal rather than civil nature when the transfer of assets already occurred and the penalty could not be purged by contemnor). Moreover, even if she could purge herself, nothing in the district court's order indicates that she would have the "key to the jailhouse" in her pocket because the district court ordered her arrest without bail. The "keys to the jailhouse" are thus firmly in the pocket of the district court since, once incarcerated, Liliane could do nothing to be released but wait for the judge to set a hearing date.

Not only is the contempt criminal in nature because of Liliane's inability to purge the contempt, but also because it is clearly punishment to vindicate the authority of the court. The district court's order for her arrest was clearly a sentence imposed "retrospectively for a completed act of disobedience." Id. If the alleged "completed act," i.e., the transfer of the shares, had been done, it cannot be undone.

The district court's own words in sentencing Liliane to arrest without bail clearly illustrate that it entered the order not as a remedial measure to coerce compliance with any order, but as a punishment for its belief that she disobeyed an expired order not to transfer the shares. The court said: "[t]he

problem that I have here is that there was an order entered by this court regarding disposition of assets, and the order was violated." The court's intent to punish Liliane is further shown by its comments that Liliane may be incapable of complying with the order, that the alleged selling of the apartment was "not an example of good faith;" that the court "cannot do anything but order their arrest in these circumstances;" and that "if they are in Europe, with this arrest warrant, they're going to be extradited." The district court thus believed that punishment was the only alternative. Additionally, the statement in the order to show cause that it was to serve as process is a further indication that the contempt proceedings were criminal in nature, being new proceedings against Liliane and Charles, rather than simply a civil enforcement proceeding.

Inasmuch as the order for contempt was criminal rather than civil in nature, it was a grievous error not to give Liliane the notice and hearing, right to counsel, right to bail, proof beyond a reasonable doubt, a presumption of innocence, the privilege against self-incrimination (and perhaps even a right to a jury trial and a hearing before another judge, Fed. R. Crim. P. 42) to which she was entitled. Liliane was not afforded any of these protections. Indeed, the district court refused the attorneys' request for a short adjournment of the contempt hearing to become fully retained and familiar with the matter so as to be able to effectively represent her and Charles respectively. This is particularly egregious as there was no emergent matter requiring immediate resolution that day as the allegation was that the shares were sold years earlier. Liliane was entitled to at least be given a fair and adequate opportunity to retain counsel, have counsel obtain the record in the case, have that counsel understand the extensive procedural and substantive history of the litigation, and to perform research and investigation as may be necessary. Liliane was afforded none of these constitutional and other protections, and the district court's contempt order should have therefore been reversed.

POINT III

THE DISTRICT COURT JUDGE SHOULD HAVE RECUSED HIMSELF FROM THIS MATTER PURSUANT TO 28 U.S.C.A. § 455(A), AND THAT ISSUE MAY BE FIRST RAISED UPON APPEAL

On the return date of the order to show cause, two attorneys appeared before the court at the request of Liliane and Charles. Those attorneys informed the court that they were contacted the previous day and one was asked to represent Liliane and the other to represent Charles. Although they informed the court that they had not accepted the retention as yet, they requested that the court allow some additional time to respond to the order to show cause to enable them to review the files, determine their acceptance of the representation of Liliane and Charles respectively, and "to become familiar with the client and with the case sufficiently to provide the defendants effective legal representation." Counsel informed the court: "[u]nless the Court gives us that time, we will not represent anybody."

Even before denying the request for additional time, the district court pre-judged the issue of the alleged contempt, stating "[t]he problem that I have here is that there was an order entered by this court regarding disposition of assets, and *that order was violated.*" The Court stated further: "Look what has happened. *They [Liliane and Charles] have proceeded to turn around and sell the apartment.* That is not an example of good faith. *I cannot do anything other than order their arrest in these circumstances.*" (Emphasis added).

The emphasized language in the foregoing quotes makes quite clear that the district court pre-judged the issues of whether Liliane improperly transferred the Park Avenue

cooperative shares, and whether she was in contempt for doing so. The district court clearly ordered Liliane's arrest for selling the shares, thus pre-judging the issue of her contempt before she could be fairly represented by counsel and heard in her defense. The district court expressed its bias against Liliane (and Charles), stating:

> This record is full of instances in which these defendants, out of disrespect for orderly proceedings before a court of justice or because of the fact that they were proceeding pro se in many various instances in which they appeared, the truth of the matter is that they have not complied with a number of dispositions. And under these circumstances, the only thing that I find prudent to do is one of two things. Either forget about it and just assume that they are incapable of complying and forget about it, simply, or just have them arrested.

With such a pre-determination of the outcome having been expressed by the district court, as well as its implied assumption that Liliane is incapable of complying with court orders, the district court clearly displayed an appearance of a lack of impartiality such that the judge should have recused himself. 28 U.S.C.A. § 455; Webbe v. McGhie Land Title Company, 549 F. 2d 1358 (10th Cir. 1977); United States v. Antar, 53 F. 3d 568 (3rd Cir. 1995). The standard for determining whether recusal is appropriate under 28 U.S.C.A. § 455(a) is an objective one which calls for the judge to determine whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the eyes of counsel, but rather in the mind of the reasonable man. United States v. Lopez, 944 F. 2d 33, 37 (1st Cir. 1991). Furthermore, an actual demonstrated prejudice need not be shown in order for a judge to recuse himself, all that is necessary is the

appearance of impartiality. United States v. Miranne, 688 F. 2d 980, 985 (5th Cir. 1982), cert. denied, 459 U.S. 1109, 103 S.Ct. 736, 74 L.Ed.2d 959 (1983).

In Webbe, the Tenth Circuit ordered that the lower court judge recuse himself on remand where he had, without reading depositions, and based only on the arguments of counsel for appellee, announced that the appellant insurance company was "stuck" before even permitting counsel for the insurance company to address the court. 549 F. 2d at 1361. The judge then entered summary judgment for the appellees. Id. In the present matter, the district judge said much more than an indirect reference to liability such as "you're stuck." He stated in no uncertain terms that Liliane had transferred the shares, had violated an order regarding transfer of the shares and, thus, would be arrested and incarcerated without bail. This was all done without the benefit of argument from Liliane or her counsel and despite the fact that she had not been personally served and had inadequate notice of the hearing. The district judge's lack of impartiality in favor of Goya is further exhibited by the extraordinary finding that Charles was in contempt even though the record showed that Charles never owned the shares in question and thus had no power to sell or transfer them (and did not do so).

Judge Fuste, however, should have recused himself from entering any of the orders of October 31, 2000 or thereafter, as well as recuse himself retroactively inasmuch as he had proceeded without even having personal jurisdiction to pre-adjudged Liliane in contempt for transferring the shares which were not subject to the district court's judgment in this matter. Inasmuch as he shed his veneer of impartiality at the October 31, 2000 hearing, his order made that day finding Liliane in contempt, as well as all previous and subsequent orders, should be reversed. *See* Antar, *supra*, 53 F. 3d at 579; *see also* Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). His lack of impartiality is further shown by his avoidance of

addressing the problem of the lack of domestication of the New Jersey judgment, which has wrongly enabled Goya to thus enforce a judgment that never had force and effect and is unenforceable in any manner in Puerto Rico. Ex parte Marquez Estrella, supra.

Although the First Circuit commented on the issue not having being raised before the district court, precedents clearly show that the issue is one which may properly be raised retroactively and even on appeal. For example, in Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977), it appears that the district court judge displayed an appearance of a lack of impartiality in the very decision that was the subject of the appeal and it does not appear that the issue was presented to the district court before being raised on appeal.

As noted by the Third Circuit in United States v. Antar, 53 F.3d 568, 572-73 (3rd Cir. 1995), the recusal statute:

> contains no explicit timeliness requirement, even when such motions are not made in the district court, we can exercise review of a district judge's failure to recuse.

In Antar, the comment at issue was made during the proceedings for the defendants' sentencing and it appears that on appeal it was first argued that the district judge should have disqualified himself *sua sponte*. Id., at 572.

While other cases are in agreement that there is no particular timeliness requirement concerning recusal under 28 U.S.C. § 455 and that it can be raised for the first time on appeal (see., e.g., Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415 (Fed. Cir. 1989), cert. denied, 490 U.S. 1047, 109 S.Ct. 1956, 104 L.Ed.2d 425 (1989) ; Noli v. Commissioner of Internal Revenue, 860 F.2d 1521, 1527 (9th Cir. 1988)), other Circuits have taken a position that it must first be raised

in the district court. Because of the importance of impartiality to the judicial system, this Court should grant Certiorari with respect to the questions of recusal and whether it can be raised on appeal if not raised before the district court.

POINT IV

THE PROVISIONAL REMEDY ORDERS DID NOT REMAIN EXTANT AFTER THE FINAL JUDGMENT, AND THE FINAL JUDGMENT DID NOT AFFORD LILIANE UNANUE SUFFICIENT NOTICE THAT IT GAVE RISE TO ANY BASIS FOR A FINDING OF CONTEMPT FOR THE ACTION SHE TOOK.

The two provisional remedy orders relied upon by Goya were entered in 1995, before the trial of this case and the entry of the final judgment. Both Fed. R. Civ. P. 64 and Rule 56 of the Puerto Rico Rules of Civil Procedure recognize that an order for a *provisional remedy* is entered for the purpose of *securing satisfaction of the judgment*. Thus, once judgment has been issued by the district court, the continued viability of the provisional remedy order must be measured against the scope of the judgment. For example, if a plaintiff seeking to restrain a transfer of two properties obtains a provisional remedy against both properties, but ultimately succeeds in obtaining a judgment against only one property, the provisional remedy cannot remain in effect with respect to the property as to which the plaintiff did not prevail. In other words, any surviving provisional remedy cannot be broader than the scope of the final judgment.

The decision of Matter of Moscoso Villaronga, 111 B.R. 13, 16 (Bkrptcy, D.P.R. 1989), recognizes that a provisional remedy will survive judgment only if the plaintiff prevails on its claim and that "the attachment lien merges with the judgment lien in the sense that there cannot be two

separate and distinct liens subsisting against the same property to guarantee payment of the same judgment." Id. at 16. As that court recognized, the judgment determines the extent of the lien. Id. Thus, to determine whether there has been any contempt here, not only must the conduct complained of be clearly prohibited by the provisional remedy orders, it must also clearly be encompassed by the final judgment.

For contempt to lie, the order violated must be clear and unambiguous. International Longshoremens' Assoc. Local 1219 v. Philadelphia Marine Trades Assoc., 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967). Here, no valid, clear and precise notice existed that a transfer or sale of the 625 Park Corporation shares remained prohibited by the judgment. While the judgment improperly recognizes plaintiff's right to execute judgment over the properties known as the Sutton House apartment in New York City and any residence registered in Liliane's name including the Fuengirola, Malaga, Spain villa and the Paris Apartment, the cooperative shares are *not* specifically identified in that judgment. *Expressio unus, exclusio alterius.*

Resort to the ambiguous words "any residence registered to her name" to try to argue that the judgment is broad enough to include the provisional remedy regarding the cooperative shares is ineffective. The First Circuit has held that that such language was too broad to be sustained, and modified the judgment. Accordingly, because that portion of the judgment was improper and hence invalid, this unsustained language from the judgment cannot be the basis for a finding of contempt.

Moreover, the decision of the First Circuit, coupled with the provisions of the district court's opinion, establish that the precision necessary for criminal contempt is absent. On the prior appeal, the First Circuit modified the judgment upon its own theory of constructive trust which was not

mentioned in the judgment of the district court. In doing so, the appellate court determined that under such a theory a judgment could reach property that was acquired with the funds of Charles,[1] but the judgment could not reach any residence in Liliane's name because it would not be possible to determine whether any such properties which were not the subject of the trial were acquired with Charles' funds. However, with respect to the Park Avenue cooperative shares, the district court found that Liliane had borrowed the purchase price from Citibank and further found that "[t]here is no documentary evidence as to who eventually paid off the loan." Thus, the district court could not conclude that the shares were acquired with Charles' funds, and hence it was by no means clear that the 625 Park Corporation shares were subject to the judgment so as to permit the provisional remedy to remain applicable.

In addition, Goya failed to effect the provisional orders. Provisional relief survives the entry of a final judgment only if its attachment to the property has been perfected. See, Quadrel Leasing de Puerto Rico v. Carlos A. Rivera, Inc., 130 B.R. 377, 383 (Bkrpty. D.P.R. 1991); Matter of Moscoso Villaronga, 111 B.R. 13, 16 (Bkrptcy, D.P.R. 1989). Fed. R. Civ. P. 64, the source of authority for the issuance of a provisional remedy by the district court, relegates the court and the parties to the law of the forum state. Here, Rule 56.4 of the Civil Rules of Puerto Rico provides:

> If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of prohibition to alienate. *The* attachment and *prohibition to alienate real property*

---

[1] However, the district court did not make findings that any property owned by Liliane had been acquired by transfer from Charles or with money of Charles.

> *shall be effected by recording them with the Registry of Property* and notifying the defendant. In case of personal property, *the order shall be carried out by depositing the personal property in question in court* or with the person designated by it under the claimant's responsibility. [emphasis added].

Here, Goya did neither. It did not record the provisional order regarding the cooperative shares either with the Registry of Property in Puerto Rico or with any comparable office in New York. Also, it did not cause the shares to be deposited in court. *Either way, under the very law governing the issuance of the prohibition to alienate, the order was never effected.* Strict adherence to every requirement of Puerto Rico Civil Procedure Rule 56 is required. Matter of Moscoso Villaronga, 111 B.R. 13, 16 (Bkrptcy, D.P.R. 1989). The district court is required to abide by the state law requirements for the provisional orders it entered. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938). It did not do so.

One cannot overcome the requirements for effecting an order prohibiting alienation by re-naming it a preliminary injunction. It is well settled that preliminary injunctions are merged into and do not survive a final judgment. Cypress Barn, Inc. v. Western Electric Co., 812 F.2d 1363, 1364 (11th Cir. 1987); Consumer Union of the United States, Inc. v. Consumer Products Safety Commission, 561 F.2d 349, 358 (D.C. Cir. 1977); Heasley v. United States, 312 F.2d 641, 649 8th Cir. 1963); Parker v. United States, 126 F.2d 370, 381 (1st. Cir. 1942). Because the district court's judgment did not include the cooperative shares, let alone clearly include them, the provisional orders cannot survive to include those shares and, hence, Liliane cannot be in contempt of those orders by selling the shares which she owned exclusively and had the right to sell.

In sum, Liliane has been held in contempt of court for selling shares of stock that were never mentioned by the trial court below, and as to which the provisional orders were not properly effected.

POINT V

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT MISAPPLIED THE FUGITIVE DISENTITLEMENT DOCTRINE

In its December 27, 2001 opinion, the First Circuit misapprehended and misapplied the fugitive disentitlement doctrine to deny Liliane a determination of the merits of this appeal. In support of its opinion, the court offered the following justifications:.

a. "the underlying conduct with which we are concerned is extremely serious" and appears to be "blatant defiance of court orders"
b. the "flight is not from some other proceeding . . . [but] grows directly out of Goya's efforts to enforce its judgment in the civil proceeding" and that the flight "prevents Goya from discovery that might be used to unearth the proceeds of the sale or otherwise enforce its judgment"
c. "the appeals are themselves little more than devices to frustrate and delay the enforcement of the original judgment [and] [i]n general, appellants main argument are without merit" and
d. "flight in this instance is unfortunately not some novel and eccentric event but is of a piece with the conduct of the appellants over a lengthy period."

These efforts to justify the application of the fugitive

disentitlement doctrine either are not grounds at law for applying the doctrine, or are clearly contrary to indisputable facts in this case.

As noted by the First Circuit in Walsh v. Walsh, 221 F.3d 204, 215 (1st Cir. 2000), cert. denied, __ U.S. __, 121 S.Ct. 1113, 148 L.Ed.2d 982 (2001), the applicability of the fugitive disentitlement doctrine with respect to a civil action brought against the "fugitive" will vary on a case by case basis. (citing, Degen v. United States, 517 U.S. 820, 823, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996)). The Degen court, and the Walsh court, identified five potential rationales for the fugitive disentitlement doctrine. Those five are: (1) the risk of delay or frustration in determining the merits of the claim, (2) the unenforceability of the judgment, (3) the compromising of a criminal case by the use of civil discovery mechanisms, (4) the indignity visited on the court, and (5) deterrence. However, the Degen and Walsh courts concluded that the third through fifth rationales are not a sufficient basis for the application of this doctrine, thus leaving only the first and second rationales as the possible justifications.

It is clear, therefore, that the First Circuit's "justification" that the conduct is serious and a defiance of court orders, is in fact nothing more than the rejected (and hence impermissible) justifications of deterrence and avenging any indignity visited on the court. Its "justification" that the conduct is part of a pattern over time, has never been accepted as a justification by the Degen or the Walsh courts as a basis for applying the fugitive disentitlement doctrine and is at best an invocation of the rejected justifications of deterrence and retribution. Similarly, its "justification" that Liliane's main arguments are without merit is not among the justifications recognized by Degen and Walsh. Neither of those courts ties the application of fugitive disentitlement to the amount of merit that the appeal may have. Indeed, such a tie-in is contrary to the application of the fugitive

disentitlement doctrine whose very effect is to avoid any assessment of the merits of the appeal.

As to any assertion of delay, the delay recognized by Degen and Walsh is delay in the determination of the *merits* of the case. Such a delay cannot be a concern in the present matter, since the merits of the case were being addressed in the normal course of the First Circuit's proceedings at the time that Liliane allegedly became a fugitive – and hence the alleged flight from the court would not and did not delay the determination of the case on the merits, which issued shortly after the alleged flight of Liliane. As to any assertion that the alleged fugitive status has delayed the enforcement of the judgment, it must be remembered that the judgment is not against Liliane personally but only against specific properties, none of which were placed beyond the court's process by the events at issue here. Moreover, events have shown that the liquidation of the shares into money for Goya was not delayed. The district court awarded Goya a judgment against the purchaser for the amount paid, and that amount was disbursed to Goya in about the same amount of time that it took for Goya to liquidate the condominium owned by Kalif Trading. Hence there has been no delay in the enforcement of the judgment.

Thus, any justification for applying the doctrine must be found in item "b" above, i.e., that it prevents Goya from discovery that might be used to unearth the proceeds of the sale or otherwise enforce its judgment. That attempt to justify the application of the doctrine is refuted at virtually every turn.

First, upon learning of the sale of the shares, Goya issued notices for over twenty depositions, a number of which were actually taken. Indeed, the discovery taken by Goya disclosed the transfer of the proceeds to an overseas account and, hence, Goya knows where those proceeds went.

As to the ability to enforce the judgment against the shares, the shares at issue were always situated within the jurisdiction of the United States. Unlike United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997), where the shares of stock were physically removed from the United States, the shares of 625 Park Corporation were transferred to the purchaser and thus remain within the reach of the Court and its process. The Barnette court found that the presence or absence of the property within the jurisdiction was crucial to whether or not the fugitive disentitlement doctrine would be applied. Id. at 1184. Thus, the present First Circuit's reliance on Barnette is misplaced in that the crucial fact leading to the application of the doctrine in Barnette, i.e., the absence of the property from the reach of the court's jurisdiction, is lacking here where the district court has asserted jurisdiction over the purchaser and the shares and awarded judgment against the purchaser, which has been paid.

The First Circuit appeared to give unwarranted concern to the defenses that might be raised by the purchaser and to the shares in Liliane's hands being the least costly means to realize on the apartment's value. As to the latter issue, the Court failed to take into account that transaction costs in the form of transfer fees and taxes amounting to over $350,000 on the $4.6 million price that was paid were actually saved by Goya when it was awarded a judgment of $4.6 million against the purchaser. Other than defenses relating to interest, the defenses raised by the purchaser include the same defenses raised by Liliane in the present appeal; and were ultimately rejected by the Court of Appeals. On the other hand, a reversal on any of those grounds raised by the purchaser would also establish that Liliane should not be deemed a fugitive for purposes of the doctrine.

The foregoing clearly shows that the application of the fugitive disentitlement doctrine to the present matter is unsustainable. In United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960

F.2d 1080, 1097 (1st Cir. 1992), the court cautioned "[w]hen a claim of disentitlement is addressed to a civil suit, the doctrine must be applied sparingly." In that case (just as in the present matter), the appellant had refused to comply with certain orders of the district court and on appeal contested the district court's jurisdiction. In deciding that that appeal must be heard, the court stated "since [appellant] committed no crime, the fugitive-from-justice doctrine does not in any way bar its prosecution of the instant appeals." Id at 1097-98. Although not adopting an absolute rule prohibiting the application of that doctrine in matters relating to civil orders, the court held that a court should be extremely reluctant to invoke the equitable doctrine of disentitlement when an appellant has not committed any criminal act. Id. at 1098. The court also specifically made clear that an exception to any application of the doctrine exists when the appellant brings a challenge to a contempt order (even though the appellant remains outside the court's jurisdiction and in violation of the order) if the appeal is with respect to the district court's lack of jurisdiction. The present matter fits squarely within the cautionary admonitions of United Electrical. In United Electrical, the court rightly held that these factors precluded the application of the fugitive disentitlement doctrine, where as here the court wrongly applied that doctrine.

To the extent that the First Circuit may have considered significant the fact that the "flight" is not from some other proceeding, the United Electrical decision makes clear that even when the "flight" is from the very orders being appealed the doctrine need not be applied.

It should be remembered that the application of the fugitive disentitlement doctrine is a doctrine discretionary with the court. See, Degen v. United States, supra (reversing application of the doctrine to a fugitive from criminal prosecution who sought to *defend* forfeiture action brought by the government). As noted by the First Circuit in Walsh v. Walsh, supra, the applicability of the fugitive disentitlement

doctrine *with respect to a civil action brought against* the "fugitive" will vary on a case by case basis. (citing, Degen). For the reasons previously set forth, it was therefore an abuse of discretion for the First Circuit to have dismissed the appeal.

CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the decisions of the United States courts in this matter.

Respectfully submitted,

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CONTENTS OF APPENDIX

Order and Opinion, U.S. District Court for the District of Puerto Rico, November 13, 1996 ..... 1a

Order and Opinion, U.S. District Court for the District of Puerto Rico, June 6, 1997 ..... 12a

Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order, Order and Opinion, U.S. District Court for the District of Puerto Rico, October 31, 1997 ..... 13a

Judgement, U.S. District Court for the District of Puerto Rico, October 31, 1997 ..... 48a

Amended Judgment of December 14, 1998, U.S. District Court for the District of Puerto Rico, ... 51a

Opinion, United States Court of Appeals for the First Circuit, November 28, 2000 ..... 54a

Judgement, United States Court of Appeals for the First Circuit, November 28, 2000 ..... 85a

Erratta, United States Court of Appeals for the First Circuit 88a

Order, United States Court of Appeals for the First Circuit, January November 5, 2001 ..... 89a

Order That Defendants Charles Unanue and Liliane Unanue Personally Appear Before the Court and Show Cause Why They Should not be Held in Contempt of Court U.S. District Court for the District of Puerto Rico, October 20, 2000 ..... 91a

Transcript of Hearing on Order to Show Cause, U.S. District Court for the District of Puerto Rico, October 31, 2000 ..... 95a

Warrant for Arrest of Charles Unanue, U.S. District Court for the District of Puerto Rico, October 31, 2000 ..... 106a

Warrant for Arrest of Liliane Unanue, U.S. District Court for the District of Puerto Rico, October 31, 2000 ..... 109a

Writ of Execution, U.S. District Court for the District of Puerto Rico, October 31, 2000 ..... 111a

Order Denying Motion by Charles Unanue to vacate, U.S. District Court for the District of Puerto Rico, December 5, 2000 ..... 116a

Order Denying Motion by Liliane Unanue to vacate, U.S. District Court for the District of Puerto Rico, February 21, 2001 ..... 117a

Opinion, United States Court of Appeals for the First Circuit, December 27, 2001 ..... 118a

Judgement, United States Court of Appeals for the First Circuit, December 27, 2001 ..... 132a

Order, United States Court of Appeals for the First Circuit, June 4, 2002 ..... 134a

Order, United States Court of Appeals for the First Circuit, June 4, 2002 ..... 136a

Statutes and Constitutional Provisions Involved 138a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

OPINION AND ORDER

Before the court are codefendants Ulpiano and Liliane Unanue's motions under Fed. R. Civ. P. 12 to dismiss plaintiff Goya Foods, Inc.'s complaint for lack of personal jurisdiction. Defendants also argue that venue is improper because there is no personal jurisdiction over them. 38 U.S.C. § 1406 (1988). Plaintiff has opposed defendants' motion. As the parties have submitted memoranda and affidavits in support of their positions, the

motion will be treated as one for summary judgment under Fed. R. Civ. P. 56. Summary judgment is rendered if the material facts are undisputed and if defendant is entitled to judgment as a matter of law. Marrero-Garcia v. Irizarry, 33 F.3d 117 (1st Cir. 1994). Having examined the parties' respective arguments, we DENY defendants' motions.

I.

This case is yet another chapter in a dispute among the heirs to the Goya empire that has been litigated with tenacity by all parties in Puerto Rico and other jurisdictions on the mainland. See, generally, In re Unanue-Casal, 164 B.R. 216 (D.P.R. 1993), aff'd, 32 F.3d 561 (1st Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1098 (1995). The present complaint alleges that defendant Ulpiano Unanue-Casal fraudulently transferred property to his wife Liliane, and to Kalif Trading, Inc., a dummy Panamanian company that serves as defendants' *alter ego* to prevent plaintiff from enforcing a $6.9 Million judgment it obtained against

Mr. Unanue-Casal in the New Jersey Superior Court. Subject matter jurisdiction of this court is invoked under 28 U.S.C. § 1332 (1988).

Plaintiff previously raised this fraudulent transfer claim in 1991, in an adversary proceeding as creditor in defendant Ulpiano Unanue-Casal's Chapter 7 case. See Matter or Unanue-Casal, 144 B.R. 604 (D.P.R. 1992), aff'd in part, appeal dismissed in part, 998 F.2d 28 (1st Cir. 1993). Back then, plaintiff sought to set aside allegedly fraudulent transfers made by defendant. Along with Mr. Unanue-Casal, named as defendants were his wife Liliane and Kalif Trading. The complaint in the adversary proceeding alleged that Since 1980, Mr. Unanue-Casal had been fraudulently transferring his assets to his wife and Kalif Trading. Among the assets allegedly transferred were cash, securities, and a condominium apartment at San Gerónimo Condominium in San Juan, Puerto Rico. Plaintiff requested an order declaring the transfers null and

void and restoring the assets to the debtor's estate. On September 12, 1995, the Bankruptcy Court for the District of Puerto Rico dismissed Mr. Unanue-Casal's case. Two months after the dismissal of Mr. Unanue-Casal's bankruptcy case, in November 1995, plaintiff filed the present lawsuit.

II.

The issue is whether defendants' contacts with Puerto Rico are sufficient under Puerto Rico law and the due process clause of the United States Constitution, so that the United States District Court for the District of Puerto Rico may exercise jurisdiction over defendants. Pritzker v. Yari, 42 F.3d 53 60 (1st Cir. 1994), cert. denied, __ U.S. ____, 115 S.Ct. 1959 (1995). The reach of Puerto Rico's long-arm statute (Puerto Rico Rule of Civil Procedure 4.7) extends to all cases where it is constitutionally permissible. Id. Due process requires that the defendant have certain "minimum contacts with the forum so that maintenance of

the suit does not offend the traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.s. 310, 316 (1945). Fewer contacts are required to support jurisdiction when the claim is related to those contacts Vencedor Mfg. Co., Inc. v. Gougler Industries Inc., 557 F.2d 886, 889 (1st Cir. 1977).

From 1962 to 1994, Mr. Unanue-Casal was domiciled in Puerto Rico, and up and until September 1995, he was a resident of Puerto Rico. Docket Document No. 21. Affidavit of Mr. Unanue-Casal. Until very recently, Mr. Unanue-Casal availed himself of this court. For five years, from 1990 to September 1995, Mr. Unanue-Casal was embroiled in the Proceedings of his Chapter 7 bankruptcy case. See In re Unanue-Casal, 164 B.R. 216 (D.P.R. 1993), aff'd, 32 F.3d 561 (1st Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1098 (1995); In re Unanue-Casal, 159 B.R. 90 (D.P.R. 1993), aff'd, 23 F.3d 395 (1st Cir. 1994); Matter of Unanue-Casal, 144 B.R 604 (D.P.R. 1992), aff'd in part

and appeal dismissed in part, 998 F.2d 28 (1st Cir. 1993).

Mrs. Unanue admits that she was a resident of Puerto Rico until June 1986. Docket Document No. 23. Affidavit of Mrs. Unanue. In a deposition taken in October 1990, Mrs. Unanue testified that she makes her home where her husband does. Docket Document No. 34, Exhibit 14. In her motion to dismiss, Mrs. Unanue does not aver or present any evidence that she no longer shares the same residence with her husband.

Plaintiff claims that the Unanues, either directly or through their agents, have both conducted business and participated tortious acts in Puerto Rico. Specifically, plaintiff alleges that defendants fraudulently transferred a condominium apartment located in San Juan, Puerto Rico, to codefendant Kalif.[1] Under the forum's long-arm statute,

[1] This apartment continued to be used by the Unanues at least until November 1995, when this lawsuit was filed. Docket Document No. 12. Exhibit 1

we may take jurisdiction over defendants, since the action arises out of defendants' business transactions and participation in tortious acts in Puerto Rico. 32 L.P.R.A. App. III, R. 4.7(a)(1), (2) (1983).

Defendants have also exhibited sufficient minimum contacts to subject them to our jurisdiction. Ticketmaster-New York. Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994). This claim arises directly from defendants' alleged fraudulent transfer of their San Gerónimo apartment, located in San Juan, Puerto Rico, to Kalif Trading, in order to defraud Goya. Defendants purposely availed themselves of this court to protect this property interest from creditors during the bankruptcy proceedings.

Further, this court has an interest in obtaining an effective resolution of this controversy that has been bouncing back and forth between this court and the bankruptcy court for the last six years. On the other hand, any inconvenience for defendants appears minimal. As

already stated, defendants have litigated in this forum for the last several years without any inconvenience shown or alleged. Nowadays, traveling between Puerto Rico and New York, defendants' alleged new domicile, does not present any onerous circumstance in a constitutionally significant way. See Pritzker, 42 F.3d at 63-64.

In sum, the instant litigation arises out of defendants' fraudulent transfer of real property located in Puerto Rico. Defendants themselves have repeatedly taken advantage of the benefits and protections of Puerto Rico and its legal apparatus. Defendants had to foresee themselves being haled into this court to litigate a matter involving their business transactions in Puerto Rico. The motions to dismiss and for improper venue are DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 13th day of November, 1996.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

OPINION AND ORDER

Plaintiff, Goya Foods, Inc., moves to strike a demand by defendants, Ulpiano Unanue Casal, a/k/a Charles Unanue, Liliane Unanue, and Kalif Trading, Inc., for a jury trial.

Fed. R. Civ. P. 38 requires the filing of a jury demand within ten days of the filing of the last pleading on the issue to be tried. In this case, as in most, the answers to

the complaint were the relevant pleadings. The only defendant who filed a demand for a jury within ten days of answering is Liliane Unanue. Charles Unanue filed his jury demand nearly six months after the filing of his answer. His demand is time-barred and he has thus waived his Seventh Amendment right to a jury. Defendant Kalif Trading asserts that since they share counsel with Liliane Unanue, her demand for a jury trial should apply to them as well. As hermeneutic an endeavor as the law may sometimes seem, it does not permit courts to divine a vicariously intended jury demand. We cannot interpret Liliane Unanue's jury demand to stand as that of another party.

Liliane Unanue had demanded a jury trial in a timely manner. However, she also happens to be the defendant against whom this court ordered an entry of default because she did not comply with court orders regarding discovery, which provides for the sanction of

entry of default under Fed. R. Civ. P. 37(b)(2). Since default has been entered against her, the trial will be held against the remaining two defendants. After default has been entered under Fed. R. Civ. P. 37(b) (2) and where hearings are required to determine the damages for judgment, a party has no right to jury trial under either Fed. R. Civ. P. 55(b) (2) or the Seventh Amendment. Goldman. Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit International. Inc., 982 F.2d 686, 692 n.15 (1st Cir. 1993), quoting Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991), see also, Eisler v. Stritzler, 535 F.2d 148, 153 (1st Cir. 1976) (holding that subsequent to entry of default a hearing, rather than a jury trial, is required to assess damages); 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §55.22(2) (3d ed. 1997). The law is crystal clear that the entry of default against Mrs. Unanue deprives her of the right to a jury trial.

Since all defendants have either waived or lost their right to a jury trial, we **DENY** defendant Charles Unanue's motion for a jury trial. This Order disposes of Docket Documents Nos. 141. 150. 153, and 154.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 6th day of June, 1997.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This case was tried before the court from July 2 to July 16, 1997. The court enters its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

I.

This case is another chapter in a long-standing dispute among members of the Unanue-Casal family,

stockholders of the Goya Foods enterprises. The case has been litigated with tenacity by all parties in Puerto Rico and other jurisdictions on the mainland for more than two decades. See generally, In re Unanue-Casal, 164 B.R. 216 (D.P.R. 1993), aff'd, 32 F.3d 561 (1st Cir. 1994), cert.. denied, ___ U.S. __, 115 S.Ct. 1098 (1995). In order to provide the reader immediate background, we briefly recount the events surrounding the Unanue-Casal family controversy.

In 1969, prior to the death of the family progenitor, Prudencio Unanue, a dispute arose between Ulpiano (Charles) Unanue and his brothers backed up by their father, Prudencio Unanue. As a result of the conflict, Charles Unanue was removed from his position as an officer and director of Goya Foods and its various affiliated companies. This event set the stage for a series of lawsuits amongst the siblings.

In 1972, the parties tried to settle their differences by reaching an agreement (1972 Agreement) under which Charles Unanue was to receive certain payments in return for selling his shares in the, Goya companies. A year later, Charles Unanue claimed that the other parties to the agreement had breached it. In 1974, the parties amended the agreement (1974 Amendment): In addition to selling his ownership interest in all of the Goya companies, Charles Unanue agreed never to bring any claim or suit contesting or objecting to his father's will or trust, and not to interfere with the disposition of assets of stock by his father, his estate, the beneficiaries or his brothers. The 1974 Amendment also specified that any signatory to the amended stipulation who lost a suit concerning Prudencio Unanue's will or trust with another signatory had to pay the winner liquidated damages of double costs and attorney's fees. By 1976, Goya had paid Charles Unanue more than

$4.4 Million for his share of the Goya corporations pursuant to the 1972 agreement and the 1974 Amendment.

In 1987, eleven years after Prudencio Unanue's death, Charles Unanue demanded from his brothers his share of his parents' estate. Joseph and Frank Unanue, as trustees of their father's trust, sued Charles Unanue in the Superior Court of New Jersey, Probate Part. They sought a declaratory judgment barring Charles Unanue from maintaining any claims against their father's estate and trust as agreed upon in the 1974 Amendment. In 1995, a New Jersey trial court entered judgment against Charles Unanue and ordered him to pay liquidated damages pursuant to the 1974 Amendment, totalling $6.9 Million. Charles Unanue appealed the judgment, but did not post a supersedeas bond or move for a stay of its enforcement. The New Jersey Supreme Court has the appeal under submission.

In the present case, Goya seeks to collect this judgment against Charles Unanue. Goya alleges that Charles Unanue is the beneficial owner of all the property that ostensibly belongs to his wife, Liliane Unanue, and to Kalif Trading, Inc.,[1] a Panamanian company that allegedly serves as defendant's *alter ego*. Among the assets are cash, securities, and several apartments. Because Charles Unanue claiming to be insolvent, has no property in his name, Goya has been prevented from satisfying the $6.9-Million judgment.

The facts in this case span across two continents and more that two decades, and involve a myriad of transactions. Therefore, we have organized our findings

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[1] This court entered the default of Liliane Unanue and Kalif Trading for failure to comply with court orders. See Docket Document Nos. 20 & 104. Notwithstanding that fact, the record confirms that the court liberally allowed Liliane Unanue to present evidence at trial. See Fed. R. Civ. P. 1.

along spacial lines for a better comprehension of the conclusions of law that follow our findings of fact.

A. Puerto Rico Transactions.

In 1968, Charles and Liliane Unanue acquired Apartment 5A at the San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico. Three years later, in 1971, they transferred the property to Emperor Equities, Inc. The corporation was solely owned by Liliane Unanue, with Charles Unanue serving as an officer of the corporation until 1988. Defendants admitted at trial that they decided to transfer the property to this corporation on counsel's advice to avoid any claim that Charles Unanue had a proprietary interest in the apartment. Back then, Charles Unanue was in contested litigation with Goya, and some of the claims sought money judgments against him.

By November 1972, Emperor Equities had purchased two more apartments at the San Gerónimo Condominium: Apartment 5D and Penthouse 11B. At that

time, Charles Unanue had already receive substantial payments from Goya. Although the apartments belonged to the corporation, defendants moved their residence to the penthouse in 1973.

Emperor Equities eventually sold or transferred Apartment 5D and Penthouse 11B. In August 1983, Emperor Equities transferred Penthouse 11B to Kalif Trading, the Panamanian company. In 1991, it sold Apartment 5D to a third party; after the sale, most of the sale proceeds were transferred to a Swiss bank account to ensure that Goya would be unable to attach the funds.

B. New York Transactions

After Charles Unanue had received all his settlement payments from Goya, both Charles and his wife Liliane participated in a series of real estate and securities transactions in New York.

In March 1976, Liliane Unanue bought shares in a cooperative apartment at 625 Park Avenue in New York.

Despite a very low purchase price of $28,000, Liliane Unanue still had to borrow money from Citibank for this transaction because she had no liquid assets. There is no documentary evidence as to who eventually paid off that loan. Although the purchase price was only $28,000, maintenance payments were $3,000 a month. Charles Unanue, and not Liliane, guaranteed to the coop board the maintenance payments. Moreover, the apartment required extensive renovations and Charles Unanue procured insurance and became the insured party in connection with these renovations.

Several years later, in 1981, Liliane Unanue purchased an apartment at the Sutton House, on East 52nd Street. Charles Unanue had leased this apartment since 1969. The person or entity who paid for the Sutton House apartment did so with a bank check drawn on Credit Suisse in New York. At the time, only Kalif Trading had an

account at that bank. Eventually, this property was sold to a third party.

Charles Unanue also invested in securities. In January 1977, Charles Unanue provided a certified financial statement to First National City Bank (Citibank). He listed as his largest asset a Merrill Lynch securities account, denominated "Mr. Charles Unanue A/C No. 2," with a net value of $1,449,000. He listed another account as "Citibank Custody Account," which had a cost value of $158,640, and a market value of $242,390. Later that same year, in November, Charles Unanue provided Merrill Lynch with personal financial information. He declared that he had at least $2,000,000 in securities. Six months later, in May 1978, Charles Unanue individually submitted a financial statement to Citibank. Charles Unanue listed the "Mr. Charles Unanue A/C No. 2," with a value of $1,977,783 net of margin debt. Finally, in September 1978, an internal memorandum from Citibank stated that Charles

Unanue's equity in his Merrill Lynch accounts was approximately $2.5 Million.

In spite of this $2.5 Million equity, Charles Unanue alleges that he had no personal funds left by 1980. He claims that taxes, attorney's fees, litigation, and living expenses consumed all his wealth, but he has no documentation to support his claim. On the other hand, Goya argues that Charles Unanue maintained substantial assets in the name of Kalif Trading. In November 1980, all the securities in the "Mr. Charles Unanue A/C No. 2" account deposited first at Merrill Lynch and later at E. F. Hutton, were transferred to a new E.F. Hutton account in the name of Kalif Trading, Inc. The securities transfer from the Mr. Charles Unanue No. 2 account to the Kalif Trading account was effected in a letter signed by Liliane Unanue on behalf of Kalif Trading.

During the eighties, over $1 Million in checks were drawn from Kalif Trading's bank accounts at the Dresdner

Bank and Credit Suisse payable to or for the benefit of Charles and Liliane Unanue. The Unanues deposited more than $700,000 in their personal checking accounts. In addition, checks representing thousands of dollars were drawn payable to the San Gerónimo Condominium Association, to the management of the Park Avenue and Sutton House apartments, to Emperor' Equities, casinos, and credit card companies. Charles Unanue signed virtually all the checks.

C. **Spain Transactions**

In May 1972, Liliane Unanue acquired a real estate villa in Fuengirola, Province of Málaga, Spain. She paid for the property in installments over a period of four years, ending in 1976. Defendants testified that Liliane Unanue paid for the property with her own funds. There is no documentation confirming the source of the money.

D. **France Transactions**

In 1985, the Société Hermitage Global, a Panamanian corporation owned solely by Liliane Unanue, bought an apartment in Paris, France. The apartment was subsequently transferred to Liliane Unanue.

II.

A. **Kalif Trading as Charles Unanue's *alter ego***

Goya seeks to impose liability on Kalif Trading for the judgment it obtained against Charles Unanue in the New Jersey Superior Court, contending that the corporation is an *alter ego* of Charles Unanue. It requests that we pierce the corporate veil and impose Charles Unanue's obligation on Kalif Trading.

1. **Governing Law**

Because Kalif Trading was involved in transactions in New York and Puerto Rico, we are faced with the threshold issue of which state law applies to this issue. Where the court's jurisdiction over the asserted claim arises

from the diversity of the parties, as in this case, the court applies the rules regarding choice of law of the forum state. In re Dupont-Benlate Litigation, 877 F. Supp. 779, 783 (D.P.R.. 1995). In Puerto Rico, courts have applied the "most significant contacts" test in cases involving tortious damages, contractual breaches, and the judicial process of piercing the corporate veil. A.M. Capen's Co. v. American Trad. & Prod. Corp., 74 F.3d 317, 321 (1st Cir. 1996); Wadsworth, Inc. v. Schwarz-Nin, 951 F.Supp. 314, 320-21 (D.P.R. 1996); Fornaris v. American Surety Co., 93 D.P.R. 29 (1966). Among the contacts to consider are the parties' place of incorporation and of business, the place where the injurious conduct occurred, the place where the injury materialized, and the place where the relationship between the parties is centered. 953 F.Supp. at 321-22.

In this case, Goya alleges that Charles Unanue has used Kalif Trading to launder his personal funds and conduct his personal business. Goya has presented

documentary evidence that in November 1980, Charles Unanue transferred all the securities in his E.F. Hutton account in New York to a newly-opened E.F. Hutton account also in New York and registered in the name of Kalif Trading. In addition, New York was the center of Kalif Trading's banking transactions, from where Charles Unanue issued checks in the corporation's name and where the corporation's funds were located. It also appears that Charles Unanue paid for the Sutton House apartment and for maintenance payments of the Park Avenue apartment with Kalif Trading's funds located in New York. From these facts, we find that New York has more significant contacts with the matter at hand than any other possible jurisdiction. Therefore, New York law will govern our determination of whether to pierce the corporate veil in this case.

2. Piercing the Corporate Veil

It is a well-established principle of corporate law that "a corporation exists independently of its owners, as a separate legal entity, . . . and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate Owners." Morris v. Department of Taxation, 623 N.E.2d 1157, 1160 (N.Y. 1993). Courts have found, however, circumstances that require the piercing of the corporate veil in order to prevent fraud or achieve equity. State of New York v Easton, 647 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1995). There exist two modalities for piercing the corporate veil. One is the classic piercing of a corporation's charter to impress the debts of a corporation upon its owners. The other, which is the one sought by Goya, is available when the court disregards the corporate form to reach the assets of a corporation for the debts of its owners. This modality is known as reverse piercing. Id. at 908-09. See generally, 1

W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 41-41.10, 41.70 (rev. perm. ed. 1990).

Regardless of the modality used, courts will evaluate the attendant facts and equities of each case in deciding whether to disregard the corporation's separate identity, since piercing the corporate veil has been characterized as an equitable remedy. David v. Glemby Co., Inc., 717 F. Supp. 162, 166 (S.D.N.Y. 1989); Easton, 647 N.Y.S.2d at 908. And because of the equitable nature of the remedy, the court will intervene even if the alleged wrongdoer is not a legal owner of the corporation but an equitable one, as alleged in this case. Id. at 909. Although no bright-line rules govern the different circumstances when courts will deny corporate independence, courts have generally required a showing that: "(1) [T]he owners exercised complete domination of the corporation in respect to the transaction attacked; and, (2) that such domination was used to commit fraud or wrong against the

plaintiff which resulted in plaintiff's injury." Easton, 647 N.Y.S.2d at 908, citing Morris, 603 N.E.2d at 1161.

Here, we must start by expressing that the story of Kalif Trading and the accounts surrounding what appears to be its fictional owner, Mr. Mohammed Kalif, are incredible. Charles and Liliane Unanue testified that Mr. Kalif is an old friend of Mrs. Unanue's family. He supposedly is a wealthy octogenarian Arab with unknown address somewhere in the Middle East. The Unanues allegedly have met up with him in such far away locations as Istanbul and Beirut. In spite of the bulky binders of exhibits that the defendants have submitted and the many discovery requests made by Goya, the defendants have not provided a scintilla of evidence as to Mr. Kalif's existence or whereabouts. Goya tried to contact Mr. Kalif through an attorney in Istanbul, with no results. The voluminous trial record before us contains only one document, a 1979 bank account signature card from the Dresdner Bank, bearing a

purported signature of Mr. Kalif. At trial, Charles Unanue admitted, however, that he may have signed the name himself.

During the 1970's, Mr. Kalif allegedly transferred approximately two million dollars to Charles Unanue and instructed him to invest the money in Charles Unanue's name. At the time, Mr. Kalif desired to invest in the United States, but did not want the funds and investments that Charles Unanue was handling to be traced to him. Although Mr. Kalif wanted to remain anonymous, in June 1979, Charles Unanue traveled to Panama for the purpose of incorporating Kalif Trading, a company whose namesake was precisely Mr. Kalif. Days after its incorporation, the company issued general and unrestricted powers of attorney to Charles and Liliane Unanue, and to Mr. Kalif. Charles Unanue has been the only one who has used his power of attorney extensively to manage all the company's accounts.

The largest of these accounts was the investment account maintained at E.F. Hutton. The trading records for this account demonstrate that Charles Unanue must have spent a considerable amount of time making investment decisions and dealing with brokers, and yet Charles Unanue did not receive any compensation for his efforts. To the contrary, the Unanues testified that when Charles Unanue allegedly became insolvent, they were forced to borrow money from Mr. Kalif. However, there is no documentation to sustain that any bona fide lending ever occurred.

On the other hand, there is documentary and circumstantial testimonial evidence that Mr. Kalif is a fictional character and that Kalif Trading is the mere *alter ego* of Charles and Liliane Unanue. There appears to be no geographical limitation on Charles Unanue's empowerment to act on behalf of the company. He has managed the company's accounts in America, as well as in Europe.

Charles Unanue used his address in Fuengirola, Spain, as the company's address on all bank and securities accounts. Charles and Liliane Unanue are named on the various opening and signature documents for Kalif Trading's accounts.

The evidence, further shows that Charles Unanue managed the company without ever keeping a proper set of financial books and records. There is only one corporate meeting reflected in the company books. This meeting took place in 1983 in Panama. Charles Unanue served as president and Liliane Unanue as secretary of the corporation. At this single meeting, Liliane Unanue was named secretary of Kalif Trading and Mr. Kalif was named president and director. Two other directors, Mr. Said Nazif Ibrahim and Mr. Mehdat Nabih Fakim, were appointed. The existence and whereabouts of these two gentlemen remain as unknown as that of Mr. Kalif. When Charles Unanue was confronted with the prospect of providing

evidence about Mr. Kalif in this litigation, Mr. Kalif supposedly removed himself from the directorship of Kalif Trading and turned over the company to Liliane Unanue in 1996. Mrs. Unanue then named herself president and treasurer of the corporation.

In conclusion, we find that Charles Unanue is the equitable owner of every asset nominally held in the name of Kalif Trading, to wit, the bank and securities accounts and Penthouse 11B at San Gerónimo Condominium. Since the corporation's creation in 1979, Mr. Unanue has exercised complete dominion and control over the corporation's assets and has intermingled his financial affairs with those of the Panamanian corporation.

B. <u>Assets in Liliane Unanue's Name</u>

Goya also contends that Charles Unanue is the beneficial owner of substantially all the assets held in his wife's name. Charles and Liliane Unanue claim that she is the sole proprietor of all the residences that Goya claims

belong to him. Liliane Unanue claims to be independently wealthy and tried to prove that she alone purchased the residential properties in Puerto Rico, New York, Spain, and France.

After careful consideration of the trial record, we find that Liliane Unanue, like Mr. Kalif, is an *alter ego* of Charles Unanue. In considering whether Liliane Unanue is Charles Unanue's second self, we found no applicable New York or Puerto Rico case law. These two jurisdictions have the most significant contacts with the issue at hand, and New York and Puerto Rico law can best assist in our analysis. A.M. Capen's Co., 74 F.3d at 322. We consequently borrow with modifications the analysis applied in the New York corporate *alter ego* cases discussed previously, as well as bankruptcy precedent where the debtor has transferred assets with the intent of defrauding. creditors, 11 U.S.C. § 727(a) (2) (1988). This court has considered such factors as the control that Charles

Unanue has exercised over Liliane Unanue's properties, the benefit and use of Liliane Unanue properties by him, the manner in which he treated the properties, and the consideration that Liliane Unanue provided for the properties. See Salomon v. Kaiser, 722 F.2d 1574, 1582 (2d Cir. 1983) (insolvent debtor purchased two homes with his own money, but had title to both placed in the name of his wife, who provided no consideration for the transfer, and debtor continued to retain possession, benefit, and use of the properties and treated them as his own, thus establishing a scheme to defraud creditors); EFA Acceptance Corporation v. Cadarette, 601 F.2d 648, 651-52 (2d Cir. 1979) (bankrupt transferred car, boat, and trailer to his fiancée without consideration some three weeks prior to filing for bankruptcy and continued to use the property, demonstrating intent to shield assets from creditors); In re Bottone, 209 B.R. 257 (Bankr.D.Mass. 1997) (material question of fact existed as to whether debtor, by continuing

to reside rent-free in home which he had conveyed to his wife, was effecting a continuing concealment of his interest in home, precluding summary judgment in proceeding brought to deny debtor's discharge).

As much as we liberalized the constraints imposed upon Liliane Unanue in the context of her default, the origins of Mrs. Unanue's wealth are totally unverifiable. Neither Charles nor Liliane Unanue have any documentation to prove that her wealth ever existed.

Liliane Unanue's family was allegedly an affluent Bulgarian family (the Dalkalovs) who suffered the hardships of World War II, but who managed nevertheless to remove part of their wealth and properties from their war-torn country before the Communists took over. However, the only documentary evidence of- the existence of this wealth was provided by Mrs. Vivian Schultz, Liliane's sister, who located and produced at trial certain bank books relating to savings accounts held in a bank in

Sophia, Bulgaria, before World War II. The accounts were in the names of Liliane's father, mother, and Mrs. Schultz. The amounts that appear deposited are modest in comparison to the alleged family fortune and there is no explanation as to how these funds were ever transferred outside of Bulgaria.

At trial, Liliane Unanue testified that during the 1950's and 1960's, her mother gave her substantial family assets which included cash, jewelry, gold bullion, artwork, furniture, and antiques. Owing to the fact that such bestowal occurred decades ago, she was allegedly unable to provide even an estimate of her wealth at any time, either in the United States or Europe. However, her sister Vivian, older than Liliane and who allegedly received cash from her mother on or about the time that Liliane Unanue did, was able to recollect, out of memory, that between 1956 and 1978, she brought into the United States approximately $200,000. There is no documentation of any of the assets

transferred or imported into the United States, although Liliane Unanue and her former husband, Mr. William Bates, testified that she did bring some furniture, artwork, and antiques into this country. The total absence of documentation or verifiable information as to the sources of Liliane Unanue's alleged wealth stands in stark contrast to the bulk of photocopies of hotel bills and airplane ticket receipts that the Unanues have furnished to prove that their lifestyle drained them of all their liquid assets.

An attempt to account for Mrs. Unanue's wealth is contained in two documents submitted by Goya. The first is a form providing financial information to Merrill Lynch in November 1977. The form indicates that Liliane Unanue's net worth at the time included just $128,000 in securities. She made no mention of any of the property that her mother allegedly gave her. The second document, prepared only a year later and signed by Charles Unanue on Liliane Unanue's behalf, is a certified financial statement

that Mrs. Unanue submitted to Citibank. Mrs. Unanue represented that she had cash in the amount of $37,000, securities totaling over $500,000, jewelry with an estimated value of $72,300, artwork of $133,400, and her furniture and antiques of $117,000. No mention of the gold bullion was made. These documents do not aid us in determining the sources of Liliane Unanue's independent wealth. By 1977, Charles Unanue had already received all the settlement payments from Goya. Therefore, Liliane Unanue's assets could have very well been provided to her by Charles Unanue and not by her parents as alleged.

In spite of her purported wealth, Mrs. Unanue never invested in real estate prior to marrying Charles Unanue in 1967. Although she had lived in the United States since the late 1950's, she never owned any real property in this country. Yet, suddenly, one year after her marriage to Charles, Mrs. Unanue began her acquisition of several residences here and abroad. As with the story of Mr. Kalif,

we are again confronted with defendants' bare allegations, a dearth of documentation, and the incorporation of entities for the only apparent corporate purpose of concealing assets, making it very difficult to give credibility to defendants' version of facts.

As to the three apartments located in Puerto Rico, it appears that Liliane Unanue incorporated Emperor Equities for the only purpose of transferring title to the Puerto Rico apartments. The first of these apartments was Apartment 5A, San Gerónimo Condominium, which the Unanues bought in 1968. During trial, the Unanues admitted that they transferred Apartment 5A to Emperor Equities in 1971 to avoid any claim that Charles Unanue had an interest in the San Gerónimo apartment. That being the case, such sale never came into existence under Puerto Rico contract law. Article 1213 of the Puerto Rico Civil Code bases a valid contract on "(1) [t]he consent of the contracting parties; (2) (a] definite object which may be the subject of

the contract; (3) [t]he cause for the obligation which may be established." 31 L.P.R.A. § 3391 (1990). The Civil Code states further that "[c]ontracts shall be binding . . . provided the essential conditions required for their validity exist." 31 L.P.R.A. § 3451 (1990). A contract that lacks any of these necessary elements is null from its inception and, therefore, the statute of limitations does not affect it. Rodriguez v. Sucesión Pirazzi, 89 D.P.R. 506, 547 (1963). "Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals." 31 L.P.R.A. § 3432 (1990). The sale contract of Apartment 5A lacked consideration. Charles Unanue never received any type of consideration for the sale of the property. The sale of the property was plainly a scheme to prevent anyone from discovering or attaching Charles Unanue's interest in the property.

By November 1972, when Charles Unanue had already received more than $500,000 in cash payments from Goya, Emperor Equities had purchased two more apartments at San Gerónimo for a total of $220,000. Although there is no evidence as to who exactly provided the funds for the purchase of these apartments, it can be inferred that Charles Unanue did with the proceeds received from Goya, especially since Liliane Unanue has been unable to provide any evidence as to her financial means for such investment. Our inference is supported by the 1978 financial statement that Charles Unanue submitted to Citibank. In that statement, Mr. Unanue listed a $223,000 loan receivable from Emperor Equities.

Four years after the purchase of the San Gerónimo apartments, Liliane Unanue bought the Park Avenue apartment for the nominal amount of $28,000. Despite all her professed wealth, she was forced to borrow money from Citibank to pay for the apartment, allegedly because

she had no liquid assets. Again, it remains a mystery who ultimately paid for it, if not Charles Unanue, who by that time had received the millionary payments from Goya.

Charles Unanue, and not Liliane, also appears to be the *de facto* owner of the house in Fuengirola, Málaga, Spain, and the Paris apartment. Liliane Unanue contracted to acquire the Spanish property when Charles Unanue had already received over $100,000 from plaintiff. As to the Parisian apartment, once more we find a Panamanian corporation as purchaser of the real property, which was eventually transferred to Liliane Unanue's name. There is no documentary evidence that Mrs. Unanue paid for these residences out of her own funds, as defendant adamantly claims. Defendant points to the monies derived from the selling of Liliane Unanue's furniture, jewelry or art as the source of funding for these purchases, but loses sight of the fact that these sales took place in the 1990's, two decades

after the Spanish house was bought and one decade after the Paris apartment was purchased.

In sum, the credible evidence in this case points to the fact that Charles Unanue paid for the properties held in Liliane Unanue's name with the payments he received under the 1972 Agreement and 1974 Amendment. Charles Unanue's defense that the purchase funds derived from gifts Liliane Unanue received from her well-to-do Bulgarian family is uncorroborated by evidence other than Charles and Liliane Unanue's testimony. While the testimony of a credible witness may be sufficient to prove a point, here the lack of documentation, coupled with the incredible account surrounding Mr. Kalif and his unusual relationship with the Unanues, does not allow us to give credibility to the claimed Daskalov fortune. Given the testimonies of Mrs. Schultz and Mr. Bates, it is not difficult to accept that the Daskalovs were an upper middle-class family that managed to remove from their country

sufficient funds to relocate elsewhere. But it is too much to ask that we give credibility to the account of the magnitude of the Daskalov wealth without any evidence as to how much it was and how it was invested, managed, and kept.

In addition, Charles Unanue has benefitted from the use and enjoyment of all these residences, and in many occasions referred to them as his own in letters to third parties. He also contributed to the maintenance of these properties throughout the years. We cannot countenance Charles Unanue's device of hiding his assets in the name of his wife for the purpose of impairing his creditors.

III.

In light of the foregoing, judgment shall be entered in favor of Goya Foods, Inc., and against Charles Unanue and his alter egos, Kalif Trading, Inc., and Liliane Unanue, allowing plaintiff to execute the New Jersey $6.9-Million judgment against the defendants' properties described here.

Because Kalif Trading is Charles Unanue's *alter* ego, a money judgment shall be entered by this court against Kalif Trading in the full amount for which Charles Unanue is indebted to Goya as ordered by the New Jersey courts, including Goya's right to execute judgment over Penthouse 11B, San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico.

Regarding Liliane Unanue, the court recognizes plaintiff's right to execute judgment over the properties known as the Sutton Houses apartment in New York City and any residence registered to her name, including the Fuengirola, Málaga, Spain, villa and the Paris apartment.

The court also concludes that Charles and Liliane Unanue acted with intent to defraud creditors by transferring, removing, and concealing property, records, information, and other financial information.

Attorney's fees and costs are imposed upon the defendants. Final execution of judgment will not be

authorized until this case is reviewed by the U.S. Court of Appeals, First Circuit, and the New Jersey Supreme Court addresses the merits of the pending appeal, and only if the result is favorable to Goya, unless good and sufficient surety is posted.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 31st day of October, 1997.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

JUDGMENT

On the basis of the Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order subscribed by the court today, Judgment is entered in favor of Goya Foods, Inc., and against Charles Unanue and his *alter egos,* Kalif Trading, Inc., and Liliane Unanue, allowing plaintiff to execute the New Jersey $6.9-Million judgment against the defendants' properties described in said opinion and order.

Because Kalif Trading is Charles Unanue's *alter ego,* a money judgment is entered by this court against Kalif Trading in the full amount for which Charles Unanue is indebted to Goya as ordered by the New Jersey courts, including Goya's right to execute judgment over Penthouse 11B, San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico.

Regarding Liliane Unanue, the court recognizes plaintiff's right to execute judgment over the properties known as the Sutton House apartment in New York City and any residence registered to her name, including the Fuengirola, Málaga, Spain, villa and the Paris apartment.

Attorney's fees and costs are imposed upon the defendants. Final execution of judgment will not be authorized until this case is reviewed by the U.S. Court of Appeals, First Circuit, and the New Jersey Supreme Court addresses the merits of the pending appeal, and only if the result is favorable to Goya, unless good and sufficient

surety is posted.

San Juan, Puerto Rico this 31st day of October, 1997.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

AMENDED JUDGMENT OF DECEMBER 14, 1998

On the basis of the Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order subscribed by the court on October 31, 1997, judgment is entered in favor of Goya Foods, Inc., and against Charles Unanue and his alter *egos,* Kalif Trading, Inc., and Liliane Unanue, allowing plaintiff to execute the New Jersey $6.9-Million judgment against the defendants' properties described in said opinion

and order.

Because Kalif Trading is Charles Unanue's *alter ego,* a money judgment is entered by this court against Kalif Trading in the full amount for which Charles Unanue is indebted to Goya as ordered by the New Jersey courts, as outlined above, including Goya's right to execute judgment over Penthouse 11B, San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico.

Regarding Liliane Unanue, the court recognizes plaintiff's right to execute judgment over the properties known as plaintiff's right the Sutton House apartment in New York City, represented by the proceeds of its sale up to $150,000, with interest from November 1995, and any residence registered to her name, including the Fuengirola, Málaga, Spain villa, and the Paris apartment. The stock certificates and shares of Emperor Equities, Inc. held in the name of Liliane Unanue can be the object of the execution of judgment allowed by means of this judgment. Said stock

and shares of Emperor Equities, Inc. shall be deposited with the Clerk of this Court within ten (10) days, to be held in custodia legis. Liliane Unanue shall not transfer or otherwise encumber said stock. The disposition contained in this paragraph is consistent with an order of even date, which is self-explanatory.

Final execution of judgment will not be authorized until this case is reviewed by the U.S. Court of Appeals, First Circuit, and only if the result is favorable to Goya, unless good and sufficient surety is posted.

San Juan, Puerto Rico, this 14th day of December, 1998.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

United States Court of Appeals
For the First Circuit

No. 98-1553
No. 99-1307
No. 99-2056
No. 99-2211

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE

Defendant.

No. 98-1554
No. 99-1308
No. 99-2057
No. 99-2212

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

ULPIANO UNANUE -CASAL,

a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S. District Judge]

Before
Selya, Circuit Judge,
Wallace,* Senior Circuit Judge,
and Boudin, Circuit Judge.

Jan Alan Brody with whom Roger Juan Maldonado, Jared Forminard and Balber Pickard Battistoni Maldonado & Van Der Tuin, PC were on consolidated brief for defendants Liliane Unanue and Kalif Trading, Inc.

Ulpiano Unanue-Casal, a/k/a Charles Unanue, pro se.

David J. Eiseman, Jose-Manuel A. de Castro and Golenbock. Eiseman, Assor & Bell on consolidated brief for defendant Ulpiano Unanue-Casal, a/k/a Charles Unanue.

Ira Brad Matetsky, Legal Department, Goya Foods, Inc., with whom Arturo J. Garcia Sola and McConnell Valdes were on consolidated brief for plaintiff.

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* Of the Ninth Circuit, sitting by designation

November 28, 2000

BOUDIN, Circuit Judge. This case involves an effort by a judgment creditor to reach both certain assets of the debtor nominally owned by the debtor's wife, and all assets owned by the debtor's alleged corporate "alter ego," Kalif Trading, Inc. The judgment creditor is Goya Foods, Inc., a major business founded in the 1930s which is now a Delaware corporation with its principal place of business in New Jersey. The debtor is Ulpiano Unanue-Casal, known as Charles, and his bankruptcy estate. The factual background and prior proceedings are as follows.

From the late 1940s until 1969, Charles served as one of the chief officers of Goya, a company founded by his father. In June 1969, in a quarrel among family members, Charles was dismissed and litigation ensued. As a result of settlements in 1972 and 1974, Charles received more than $4 million from Goya and, in exchange, gave up

his interest in Goya. Charles also agreed not to bring any further claim or suit regarding his father's will or estate. The agreement provided for liquidated damages of twice the winning side's litigation expenses, including attorney's fees, if any signatory wrongfully initiated new litigation against another signatory.

In 1987, Charles made a claim for a share of the inheritance from his parents, and litigation in New Jersey state court followed, with his brothers seeking a declaration that Charles had no interest in either his father's estate or his inter vivos trust. In 1990, while the New Jersey litigation proceeded, Charles filed for bankruptcy in Puerto Rico, and his bankruptcy estate thereafter became a party to the New Jersey litigation. In February 1995, the New Jersey court entered a judgment against both Charles and his estate for about $6.9 million, representing liquidated

damages for Goya, a signatory of the 1974 settlement that Charles had violated by making his inheritance claims.[1]

Meanwhile, prior to this New Jersey judgment, Goya had begun adversary proceedings in Charles' bankruptcy case in Puerto Rico, asserting that Charles was concealing his own assets under the names of his wife, Liliane, and two other companies, Emperor Equities, Inc., a Delaware corporation wholly owned by Liliane, and Kalif Trading, a Panamanian corporation which was organized by Charles.[2] On September 12, 1995, the bankruptcy court dismissed Charles' bankruptcy case without granting him a

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[1] The New Jersey judgment was entered, In re Unanue, No. M-128817, slip op. (N.J. Super. Ct. Ch. Div. Feb. 23, 1995), and has since been affirmed, 710 A.2d 1036, 1041 (N.J. Super. Ct. App. Div.), cert. denied, 724 A.2d 801 (N.J. 1998).

[2] In 1991, after Emperor sold a piece of real property and proceeds were transferred to a Swiss bank account in Liliane's name, the bankruptcy court restrained remaining sales of real property pendente lite. See Quiros-Lopes v. Unanue-Casal (In re Unanue-Casal), 144 B.R. 604, 606-07 (D.P.R. 1992)

discharge. In re Unanue-Casal, No. 90-04490, slip op. at 5 (Bankr. D.P.R. Sept. 12, 1995)

In November 1995, nine months after obtaining the New Jersey judgment for $6.9 million, Goya brought the present action in federal district court in Puerto Rico against Charles, Liliane, and Kalif Trading, seeking to enforce the New Jersey judgment against Charles and against properties that Goya claimed belonged to Charles but were held in the name of Liliane or Kalif Trading. A ten-day bench trial ensued in the district court in July 1997, and both Charles and Liliane testified. On October 31, 1997, the court filed a lengthy decision in Goya's favor, Goya Foods, Inc. v. Unanue-Casal, 982 F. Supp. 103 (D.P.R. 1997). Clarifying amendments to the judgment followed on March 10 and December 14, 1998.

The district court concluded that Charles was the true owner of specified cash, securities and various real properties held in the names of Liliane, Emperor Equities,

and Kalif Trading. The court rejected as false assertions by Charles and Liliane that Kalif Trading was owned by a wealthy Arab (who did not appear at trial), and that a supposed fortune inherited by Liliane from her family accounted for various of the real properties held in her name.

The judgment, as finally amended, determined that Kalif Trading was Charles' alter ego and was therefore responsible for the New Jersey judgment to the full extent of its assets. As for Liliane, the court's judgment provided that Goya could execute only against the following: (1) the proceeds of the Sutton House apartment Liliane had earlier owned in New York but since sold; (2) "any residence registered to her name, including the Fuengirola, Malaga,

Spain villa, and the Paris apartment";[3] and (3) the stock of Emperor Equities, all of which was held in Liliane's name, and which the court directed Liliane to deposit with the court.

Charles, Liliane and Kalif Trading have now appealed from the district court's judgment. They contest the findings of fact and legal conclusions that led the district court to impose liability for the New Jersey judgment on property held in the name Liliane, Kalif Trading and Emperor Equities. They also contend that the statute of limitations and a contractual release debar Goya's claims and say that the district court committed various procedural errors. We consider the merits of those arguments that have not been forfeited.

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[3] Fairly read, the judgment encompasses another New York apartment on Park Avenue which was the subject of evidence at trial and was held in Liliane's name at the time of the judgment. Apart from these three real properties, it is not clear what other real property held in Liliane's name at the time of the judgment was meant to be included.

1. Kalif Trading. It is easiest to begin with the district court's treatment of Kalif Trading, an off-shore company that Charles organized in 1979 and for which he and Liliane have had general power of attorney since incorporation. In November 1980, Charles transferred over $1 million to Kalif Trading in assets from his own securities account. At about this time, he ceased to pay alimony to a former wife and also stopped paying taxes, claiming that he no longer had any income or assets. In August 1983, Kalif Trading was also given title of a penthouse apartment in Puerto Rico previously held by Emperor Equities and apparently acquired with Charles' assets.

At trial, Charles claimed that Kalif Trading was owned by one Mohammed Kalif, but the court found that there was no evidence that Mohammed Kalif existed (he did not appear at trial), and that the company was a vehicle used by Charles to conceal his own assets. This finding

was supported not only by Charles' effective control of the assets, but also by his use of Kalif Trading's bank accounts to pay hundreds of thousands of dollars in bills for Charles and his wife, by the transfer of assets from Charles to Kalif Trading, and by the timing of Kalif Trading's creation.

In imposing liability on Kalif Trading, the district court applied New York law, after finding that Puerto Rico courts would apply a "most significant contacts" test, A.M. Capen's Co. v. American Trading & Prod. Corn., 74 F.3d 317, 320 (1st Cir. 1996), and that New York's contacts with transactions involving Kalif Trading were greater than those of any other relevant jurisdiction. The brief filed for Liliane and Kalif Trading does not dispute the decision to apply New York law; Charles does so in his reply brief, but his arguments are terse, unpersuasive and too late. Rivera-

Muriente v. Agosto-Alicea, 959 F.2d 349, 354 (1st Cir. 1992).[4]

Under New York law, the corporate veil may be disregarded where the challenger shows two facts: (1) complete domination of the corporation by its alleged alter ego, and (2) use of that domination to commit a fraud or wrong against the plaintiff. Morris v. New York State Dep't of Taxation & Fin., 623 N.E.2d 1157, 1160-61 (N.Y. 1993); see also New York v. Easton, 647 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1995). Although veil piercing is usually employed to make an individual or a corporate parent liable for the debts of a corporation, so-called "reverse piercing" (which makes the corporation liable for the debts of its

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[4] Panama, as the state of incorporation, may well supply the presumptively applicable legal regime for veil piercing claims; but under the Restatement rule, apparently followed in Puerto Rico, New York law could nevertheless be applied where, as here, Kalif Trading's business activities occurred primarily in New York and have no connection to Panama. See Wadsworth, Inc. v. Schwarz-Nin, 951 F.Supp. 314, 320-21 (D.P.R. 1996) (citing Restatement (Second) of Conflict of Laws § 309 (1971)).

owner or parent) is allowed under New York law where the assets at issue are held by the target corporation and the liability is that of the individual who dominates the corporation and is using it to perpetrate a fraud or wrong. Wm. Passalacqua Builders. Inc. v. Resnick Develoners S., Inc., 933 F.2d 131, 138 (2d Cir. 1991).

It may be open to dispute whether Kalif Trading was initially formed for the purpose of shielding assets from Goya. Although the district court's decision so suggests, New York law requires "clear and convincing" evidence of such fraud, Lowendahl v. Baltimore & Ohio R.R. Co., 287 N.Y.S. 62, 76 (N.Y. App. Div.), aff'd, 6 N.E.2d 56 (N.Y. 1936), and such evidence seems lacking because Kalif Trading's formation and the transfer of Charles' assets to it took place after Charles' original litigation with Goya had been settled (in 1972 and 1974) and before Charles made his 1987 claim for a share of his parents' estate.

Nevertheless, even if Kalif Trading's origin is not tainted by fraud, New York still permits veil piercing where the corporate vehicle is being used to inflict "wrongful or inequitable consequences." TNS Holdinas, Inc. v. MKI Sec. Corp., 703 N.E.2d 749, 751 (N.Y. 1998). New York courts have held that this test can be satisfied when a corporation is "a mere shell dominated and controlled by another for the latter's own purposes."[5] Guptill Holding Corp. v. New York, 307 N.Y.S.2d 970, 973-74 (N.Y. App. Div. 1970), aff'd, 292 N.E.2d 782 (N.Y. 1972), is inapposite here because, given Charles' denial of ownership of Kalif Trading, there is no easy way for Goya to levy directly on Charles' formal ownership interest in Kalif Trading.

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[5] 888 7th Ave. Assocs. Ltd. P'ship v. Arlen Corp., 569 N.Y.S.2d 16, 17 (N.Y. App. Div. 1991); see also National Union Fire Ins. Co. v. Bodek, 705 N.Y.S.2d 42, 43 (N.Y. App. Div. 2000); Austin Powder Co. v. McCullough, 628 N.Y.S.2d 855, 857 (N.Y. App. Div. 1995).

There is ample proof that Kalif Trading is effectively the alter ego of Charles--who created it, initially funded it with his own assets, managed it, and paid his own and his wife's expenses with its assets. Whether or not it was originally created to shield assets from creditors, it is not a business separate from Charles, and there is no indication it has any owners other than Charles. It appears to us, as to the district court, to be nothing other than Charles himself under another name, and therefore under New York law it is permissible to strip away the corporate fig leaf.

2. Assets in Liliane's Name. The claim as to Liliane's assets is more complicated. In 1968, Liliane and Charles took joint title to an apartment in San Juan, Puerto Rico, and in 1971, during the earlier round of litigation between Charles and Goya, the title to the apartment was transferred to Emperor Equities, Inc., a Delaware corporation wholly owned by Liliane. During and after 1972, the year in

which Charles received the first installment of payments from Goya, Liliane and Emperor Equities developed a pattern of real estate acquisitions in which they obtained title to other luxury residences in Puerto Rico, New York, France, and Spain.

At trial, Liliane claimed that these properties had been acquired with assets provided by her once wealthy Bulgarian family. However, the district court concluded that this story was untrue, being uncorroborated and inconsistent with other evidence. It also concluded that the properties in question had been purchased by Charles, who used and enjoyed all of the residences "and in many occasions referred to them as his own in letters to third parties." Goya Foods, 982 F. Supp. at 112. In substance, the court found that Charles was "hiding his assets in the name of his wife for the purpose of impairing his creditors." Id.

Liliane's brief makes no persuasive attack on the district court's findings, which we find were adequately supported. Rather, the brief concentrates its criticism on the district court's theory of liability. Because the district court described Liliane as Charles' "alter ego" in relation to the acquisitions, Liliane says that the district court wrongly applied to a human being a theory that is only valid in relation to corporations. See, e.g., Werner-Jacobsen v. Bednarik, 946 P.2d 744, 747-48 (Utah Ct. App. 1997) ("An individual cannot be the 'alter ego' of another."). Further, says Liliane, property held in her name belongs to her "even if it were assumed that Liliane obtained her properties with Charles' money and not with her own . . . ."

The district court's use of the "alter ego" language to describe the relationship between Charles and Liliane may be inapt--no New York decision appears to use it in such circumstances--and in New York the property of one spouse certainly is not automatically subject to seizure for

the debts of the other spouse. But New York courts have used the equitable theory of "constructive trust" to allow a third-party creditor to execute judgment on assets nominally owned by someone other than the debtor but, based on the court's findings, actually owned by the debtor himself.[6] It appears to us that, in using the alter ego language, the district court meant only that the properties in question were Charles' property but were merely held in his wife's name.

In some circumstances, even an intended transfer of ownership can be set aside. For example, if a specific transfer from one spouse to another were made without consideration to defraud a creditor, a different set of New York doctrines ("actual or constructive fraud") could be invoked, see Scola v. Morgan, 412 N.Y.S.2d 893, 895

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[6] Duncan v. Laury, 292 N.Y.S. 138, 139-41 (N.Y. App. Div. 1937); cf. Tesmetges v. Tesmetges, 47 B.R. 385, 390-91 (E.D.N.Y. 1984). See generally Latham v. Father Divine, 85 N.E.2d 168, 170 (N.Y. 1949)

(N.Y. App. Div. 1979); 30 N.Y. Jur. 2d Creditors' Rts. & Remedies §§ 300-71 (1997); but in this case there are no detailed findings with respect to each of the individual transactions at issue that would establish fraudulent intent, see In re Montclair Homes, 200 B.R. 84, 96 (E.D.N.Y. 1996), or constructive fraud, see N.Y. Debtor & Creditor Law 55 273-75 (McKinney 1990), nor did the district court purport to make such findings.

However, under the theory of constructive trust, no such specific findings are required if the purchases were with Charles' own funds, the transfers of title to Charles' wife Liliane were merely nominal, and the parties intended that Charles continue to possess beneficial ownership of the properties. See Bankers Sec. Life Ins. Soc'v v. Shakerdae, 406 N.E.2d 440, 440 (N.Y. 1980). This, in substance, is what the district court found. It does not make Liliane personally liable for her husband's debts; but it does mean that the property which he beneficially owns but which

happens to be held in her name can be reached through the constructive trust doctrine for the benefit of his creditors.

Here, the circumstantial evidence of an implicit understanding is strong. The timing of the transactions in relation to prospective litigation, Charles' continued treatment of the properties as his own, the parallels to the deceptive operation of Kalif Trading, and the inferences to be drawn from Liliane's baseless claim that the properties were paid for with family funds all contribute to the conclusion that the real estate in question was Charles' and not Liliane's. Given that Charles and Liliane's "agreement" could be inferred from the circumstances, see In re Estate of Knappen, 655 N.Y.S.2d 110, 111-12 (N.Y. App. Div.), cert. denied, 683 N.E.2d 335 (N.Y. 1997), there is enough to sustain the district court's assessment of the situation under a clear error standard.

Two New York cases, not cited by the parties, make clear that a constructive trust is not automatically justified

to undo a property transfer between spouses even when the purpose of the transfer (in each case, one involving the marital residence) is to protect against present or future claims by the creditors of the transferring spouse.[7] However, those cases are distinguishable for they involved what the New York courts found to be genuine transfers that occurred without an understanding between the parties that the property would remain that of the transferring spouse. In our case, by contrast, the thrust of the district court's findings is that ownership was conveyed in name only.

This lack of an effective conveyance (and the resulting applicability of constructive trust theory) also answers the argument of Charles and Liliane that the statute of limitations bars the effort to reach property held in Liliane's name. Although the New York statute of

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[7] Macina v. Macina, 455 N.E.2d 1258, 1259 (N.Y. 1983), aff'd 463 N.Y.S.2d 43 (N.Y. App. Div. 1983); Rossignol v. Silvernail, 635 N.Y.S.2d 772, 773 (N.Y. App. Div. 1995).

limitations requires that suit based on fraudulent conveyance be brought within six years of the transfer or two of discovery (actual or constructive) of the fraud, Wall St. Assocs. v. Brodsky, 684 N.Y.S.2d 244, 248 (N.Y. App. Div. 1999), that is not the theory of recovery. In the case of a constructive trust, the limitations period (six years, Maric Pining. Inc. v. Maric, 705 N.Y.S.2d 684, 685 (N.Y. App. Div. 2000)) begins to run only when "the wrongful withholding" occurs, Augustine v. Szwed, 432 N.Y.S.2d 962, 965 (N.Y. App. Div. 1980); accord Whalen v. Gerzof, 564 N.E.2d 656, 657 (N.Y. 1990), and the original date of transfer is not relevant.

The district court's rationale justifies its judgment to the extent that it recognizes Goya's right to execute against the identified real property held in Liliane's name, specifically, the three named properties in New York, Paris, and Malaga. However, despite its broad literal wording, Goya Foods, 982 F. Supp. at 112, we do not construe the

district court judgment as extending to any residence held in Liliane's name that has not yet been identified in this litigation. The constructive trust doctrine cannot easily be applied to property whose identity and circumstances of acquisition are unknown.

3. Emperor Equities. Next, we consider the various issues raised by Liliane's ownership of Emperor Equities. One set of the real properties at issue were three condominium apartments in Puerto Rico. One was acquired by Charles in 1968, title being taken in the joint names of Charles and Liliane; in 1971, during Charles' litigation with Goya, this property was transferred to Emperor, a corporation whose sole shareholder was Liliane. Two further condominiums in San Juan were acquired in 1972, after Charles received a large initial payment from Goya. They too became properties of Emperor. One was transferred in 1983 to Kalif Trading,

but the other remained in Emperor's name until being sold to a third party in 1991.

Despite its involvement in Charles' and Liliane's real estate transactions, Emperor was not named as a defendant in Goya's district court action seeking to reach assets of Charles held in the names of third parties. Liliane says that this is because Emperor was a Delaware corporation and, as this was also true of Goya, naming Emperor as the defendant would have destroyed diversity jurisdiction. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). Liliane says that it was an error for the district court to order Emperor, a non-party to the litigation, to forfeit its property, since Emperor was not itself a party to the case.

The short answer is that the district court judgment did not purport to reach properties held by Emperor at all. Instead, as clarified by the amended judgment of December 14, 1998, the district court directed that the "stock

certificates and shares" of Emperor held by Liliane (it is unclear why both words were used) should be deposited with the court so that they could be used to satisfy the judgment. Such a judgment was within the district court's power, for Liliane was a party to the case, and reaching securities that she owns does not require that the securities' issuer be a party.

4. Miscellany. There remain two other arguments of importance. First, in his opening brief on appeal, Charles claims that, in seeking to enforce the New Jersey judgment, Goya overlooked a procedural precondition. Since the New Jersey judgment was not initially entered by another federal court, it could not merely be registered in the federal district court in Puerto Rico under 28 U.S.C. § 1963 (1994). Rather, enforcement was governed by Fed. R. Civ. P. 69(a), providing that federal proceedings to enforce any out-of-state judgment of a state court should

follow the practice of the state in which the federal district court sits.

Charles asserts that, under Puerto Rico law, for a foreign judgment to be enforceable in Commonwealth courts, it must first be validated and domesticated in an "exequatur" proceeding in the Superior Court of Puerto Rico. Ex parte Marquez Estrella, 128 D.P.R. 243, 247-56 (1991). This proceeding allows interested parties to raise certain limited defenses against the enforcement of a foreign judgment. Charles says that Goya failed to have the New Jersey judgment validated in this manner, that the New Jersey judgment was therefore "not properly before the District Court," and that lack of an exequatur proceeding deprived Charles of his right to challenge validation of the judgment on the permitted grounds.

It may be (we take no position on the matter) that to enforce a state court judgment in the federal district court in

Puerto Rico, there must be a prior exequatur proceeding[8] or some equivalent opportunity to challenge the non-Commonwealth judgment in the federal proceeding itself. However, Charles and Liliane first made their exequatur argument in July 1999, more than a year and a half after the district court had initially entered judgment against them. Thus, this argument was not made in a timely fashion, whether viewed as subject to the ten-day rule of Fed. R. Civ. P. 59(e) or the more relaxed one-year or reasonable-time restrictions of Fed. R. Civ. 60(b).[9]

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[8] Compare Hibbs v. Yashar, 522 F. Supp. 247, 249-54 (D.R.I. 1981) (Rhode Island statute requiring preliminary judicial screening of medical malpractice cases), with Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880, 889 (1st Cir. 1981) (Massachusetts law requiring screening of medical malpractice claims by an administrative tribunal). See generally 19 Wright, Miller & Cooper, Federal Practice and Procedure § 4511 (1996).

[9] Neither of the amended judgments substantively altered the original judgment or provided any other excuse for the failure to raise the exequatur issue in timely fashion. See Berwick Grain Co. v. Illinois Dep't of Agric., 189 F.3d 556, 560 (7th Cir. 1999).

The exequatur objection is not one that goes to the district court's subject matter jurisdiction and which might therefore be exempt from the ordinary requirements of timeliness. See Sea-Land Serv.. Inc. v. Ceramica Europa II, Inc., 160 F.3d 849, 852 (1st Cir. 1998). Nor, it is worth adding, is there any indication that Charles and Liliane were precluded from raising in the district court any substantive objections to the enforcement of the New Jersey judgment that might have been asserted in a Commonwealth exequatur proceeding. Charles did claim that the New Jersey court lacked jurisdiction to enter the judgment against him, but he did not pursue this issue on appeal in his opening brief, and it is therefore forfeited.

Second, Liliane claims that the district court erred by entering a default judgment against her and, later, by not affording her a jury trial even though the court ultimately allowed her to present her case on the merits. The district court entered a default against Liliane in March 1997 as a

sanction for repeated failures to comply with court orders. Liliane's earlier demand for a jury trial was then struck on Goya's motion (no other party having made a timely request for a jury trial). Nevertheless, at trial the district court reversed field and allowed Liliane's counsel to offer witnesses and to present a defense, and it then resolved the claims against her on the merits. At no time during the trial did Liliane offer an objection to the bench trial or ask the court to reinstate her jury trial request.

On this appeal, little need be said about Liliane's challenge to the original default. Although the remedy was severe, it followed obstreperous acts and clear advance warning from the district court, and it was not an abuse of discretion. Cf. Faigin v. Kelly, 184 F.3d 67, 84 (1st Cir. 1999); John's Insulation. Inc. v. L. Addison & Assocs., Inc., 156 F.3d 101, 108-10 (1st Cir. 1998). The more troublesome question is whether, insofar as the district court proceeded to try and decide Liliane's case on the

merits, it should also have afforded her the jury trial she originally demanded. In posing this question, we assume dubitante that the original jury trial request was proper.[10]

Assuming that a right to jury trial otherwise existed, it was not preserved. Once the default was effectively withdrawn, Liliane could not proceed to present her case without telling the district court that she wanted the jury request reinstated and then, after losing, complain that a jury should have been afforded. This kind of mouse-trapping, whether deliberate or inadvertent, is forbidden. Daigle v. Maine Med. Ctr.. Inc., 14 F.3d 684, 687-88 (1st Cir. 1994). A claim to a jury trial can be forfeited just like any other non-jurisdictional request or objection.

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[10] Imposition of a constructive trust is equitable in nature and, thus, may not trigger the right to a jury trial under the Seventh Amendment. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 40-42 (1989); RTC v. Pasquariello, 16 F.3d 525, 531 (3d Cir. 1994); see also Latham v. Father Divine, 85 N.E.2d 168, 170 (N.Y. 1949) ("[A] constructive trust is merely the formula through which the conscience of equity finds expression . . . . (internal quotation marks and citations omitted)).

Appellants present other arguments, including claims that personal jurisdiction over Charles and Liliane was lacking, that Charles was denied adequate discovery, that Charles was entitled to rely on Liliane's request for jury trial, that (according to Charles) New York law does not apply, and that misconduct by Goya warranted sanction and dismissal. However, all of these claims have been raised only in reply briefs, and it is well-settled that the attempt to present issues in this manner is untimely and that such claims therefore need not be considered. Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349, 354 (1st Cir. 1992).

Finally, the appellants argue that a 1974 contractual release given by Goya precludes Goya's present claims. This argument was admittedly not presented to the district court and is therefore forfeited in this court. It is doubtful that such a defense, if not seasonably asserted, could ever

be rescued by the plain error doctrine, but in any event there is no miscarriage of justice in its forfeiture here.

The appellants also have made, or at least insinuated, a variety of other arguments; to the extent these arguments are properly before us, we believe that they are without merit, and we reject them without detailed discussion. For the reasons stated, the judgment of the district court is affirmed with the clarification that insofar as the judgment permits Goya to levy against real properties held in Liliane's name at the time of judgment, it extends only to those real properties identified in the district court proceedings and not other unnamed properties. Appellants have pending a motion for reconsideration of our prior order striking various exhibits, and we now deny the motion to reconsider.

It is so ordered.

United States Court of Appeals
For the First Circuit

No. 98-1553
No. 99-1307
No. 99-2056
No. 99-2211

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE

Defendant.

No. 98-1554
No. 99-1308
No. 99-2057
No. 99-2212

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

ULPIANO UNANUE -CASAL,

a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants.

JUDGMENT

Entered: November 28, 2000

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed with the clarification that insofar as the judgment permits Goya to levy against real properties held in Liliane's name at the time of judgment it extends only to those real properties identified in the district court proceedings and not other unnamed properties.

By The Court

Clerk.

United States Court of Appeals
For the First Circuit

No. 98-1553
No. 99-1307
No. 99-2056
No. 99-2211

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE

Defendant.

No. 98-1554
No. 99-1308
No. 99-2057
No. 99-2212

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

ULPIANO UNANUE -CASAL,

a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants.

ERRATA

The opinion of this Court, issued on November 28; 2000, should be amended as follows.

On page 12, line 2 of 2nd paragraph, delete "the".

On page 14, line 6, delete "three named" and add "mentioned above" after "Malaga" and before the period.

On page 15, line 4, replace "the" with "a".

On page 17, line 5, replace "Fed. R. Civ. 60(b)." with "Fed. R. Civ. P. 60(b)."

United States Court of Appeals
For the First Circuit

Nos. 98-1553. 99-1307, 99-2056, and 99-2211

GOYA FOODS, INC.,
Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE
Defendant.

Nos. 98-1554, 99-1308, 99-2057 and 99-2212

GOYA FOODS, INC.,
Plaintiff, Appellee,

v.

ULPIANO UNANUE -CASAL,
a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

BEFORE
SELYA, Circuit Judge,
WALLACE*, Senior Circuit Judge,
BOUDIN, STAHL, LYNCH and LIPEZ, Circuit Judges.

ORDER OF COURT

January 5, 2001.

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petitions for rehearing and suggestions for rehearing en banc, be denied.

By the Court:
PHOEBE D. MORSE, Clerk

By: Janice M. O/Neil
Chief Deputy Clerk

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* Of the Northern District of California, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

ORDER THAT DEFENDANTS CHARLES UNANUE AND LILIANE UNANUE PERSONALLY APPEAR BEFORE THE COURT AND SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT OF COURT

WHEREAS, by an Order Prohibiting Alienation of Properties of Defendants (Docket No. 5) and an Order Prohibiting Alienation of Cooperative Shares (Docket No. 9), each entered November 17, 1995 (the "Orders"), this Court prohibited the defendants in this action and their agents, employees, and all persons holding property for them or acting in concert with them, from alienating or in any way assigning, transferring, selling, or otherwise disposing of certain properties, specifically including Apartment 10A at 625 Park Avenue, New York, New York and the cooperative shares relating thereto ("Apartment

10A"), and both of the Orders have remained and continue to remain in full force and effect; and

WHEREAS, based upon Plaintiff's Emergency Motion for an Order Directing Defendants Charles Unanue and Liliane Unanue To Personally Appear before the Court and Show Cause Why They Should Not Be Held in Contempt of Court for Their Willful Violation of Two Orders of the Court, and for Other Relief (7' Plaintiff' s Motion"), filed by plaintiff Goya Foods, Inc. ("Goya") on October 16, 2000, and the exhibits annexed thereto, it appears that defendants may have sold and transferred the Apartment to a third party on or about June 19, 1998, and may thereby have violated the Orders;

NOW, THEREFORE, IT IS ORDERED that the prior order of this Court entered August 19, 1999, directing that no further papers be filed in this action pending resolution of defendants' appeals from this Court's judgment (Docket No. 323) be and is hereby modified to permit the filing of Plaintiff's Motion and all documents relating to the subject-matter thereof; and it is further

ORDERED that defendant Charles Unanue a/k/a Ulpiano Unanue-Casal and defendant Liliane Unanue each shall APPEAR PERSONALLY BEFORE THIS COURT, together with counsel if they be so advised, on the 31st day of October, 2000, at 9:30 AM o'clock, __.m., in Courtroom JAF at the United States Courthouse located at 150 Carlos Chardon Avenue, Hato Rey, Puerto Rico, and then and there SHOW CAUSE why they should not be held in CONTEMPT OF COURT for their knowing and willful violation of the Orders of this Court, and why the Court should not grant appropriate relief therefor; and it is further

ORDERED that any papers submitted by Charles

Unanue or Liliane Unanue or their counsel in opposition to Plaintiff's Motion shall be filed and served upon plaintiff's counsel to be received at least two business days prior to the hearing date; and it is further

ORDERED that service of a copy of this Order To Show Cause, together with a copy of Plaintiff's Motion, shall constitute service of process summoning Charles Unanue and Liliane Unanue to APPEAR PERSONALLY in court as directed herein, such that an appropriate warrant for their arrest and detention shall issue upon their failure to appear as directed; and it is further

ORDERED that plaintiff is granted leave to conduct appropriate discovery proceedings on an expedited basis in any judicial district, including the service of notices to defendants and third parties for the production of documents and for the depositions of defendants and third parties, relating to the transfer and sale of the Apartment, or any other conduct by any person or entity alleged by plaintiff to be in violation of the Orders or any other order of this Court or to have aided and abetted such violations; and it is further

ORDERED that defendants; comply with any document request served upon them pursuant to the preceding paragraph within five business days after service thereof; and it is further

ORDERED that the stay or execution of the Judgment of this Court dated October 31, **1997,** as amended on March 10, 1998, and December 14, 1998, which stay was entered by this Court sua sponte pending resolution of defendants' appeals to the United States Court of Appeals for the First Circuit, be and it hereby is vacated effective at the close of business on the third business day following service of this

Order upon Charles Unanue and Liliane Unanue, unless within that time defendants pay the sum of $4,.600,000 into the Office of the Clerk of this Court, or, alternatively, post a bond or other good and sufficient security in an amount no less than $4,600,000, for the satisfaction of all judgments in plaintiff's favor against them in the event that the judgment of this Court is affirmed.

Entered at Hato Rey, Puerto Rico, this 20th day of October, 2000.

/s/

JOSE ANTONIO FUSTE
Unites States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXHIBIT
E

GOYA FOODS, INC., et al.,	.	Civil No. 95-2411
	.	
v.	.	Hato Rey, Puerto Rico
	.	October 31, 2000
CHARLES UNANUE AND LILIANE UNANUE, et al.,	.	
	.	
	.	
Defendants.	.	
. . . . . /		

TRANSCRIPT OF HEARING ON ORDER TO SHOW CAUSE

BEFORE THE HONORABLE JOSE ANTONIO FUSTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	ARTURO GARCIA SOLA, ESQ. JOAN MULET, ESQ. IRA MATETSKY, ESQ.
For the Defendants:	ALVARO CALDERON, ESQ. HAROLD VICENTE, ESQ.
Court Reporter:	Donna W. Dratwa, RMR, CRR

PROCEEDINGS

THE COURT: Let's call the case.

THE CLERK: For order to show cause, Civil95-12411, Goya Foods, Inc., et al., versus Charles Unanue, et al. Will the attorneys please come forward and identify themselves for the record.

MR. GARCIA: Good morning. Arturo Garcia Sola, representing Goya Foods, Inc., and together with Joan Mulet from McConnell Valdes, and Mr. Ira Matetsky, who is now legal counsel for Goya, and we are ready to proceed.

MR. CALDERON: I don't know if, this being Halloween, it may sound as trick or treat. We received yesterday several telephone calls, one from Jan Brody in New Jersey, and subsequently we received two calls from Mr. Unanue, requesting that we represent them. When I say "them," Mr. Unanue and Liliane, his wife. That's why they called two attorneys. We were very clear with Mr. Brody and Mr. Unanue that it was for us to even decide whether we would accept them as clients in such short notice. And we told them in no uncertain terms that we would not come to the court to tell the Court that we were representing them.

As a matter of fact, I don't know if we decided later whether we're going to represent them, whether I'm going to represent him or her. We haven't come to that point yet. So we explained to him that all we do today would be to explain to the Court the situation and ask the Court if the Court feels in its discretion that it can give the parties an additional time in order to allow us to see the

files and study and decide whether we are going to be attorneys or not. We really do not know whether we want to get involved in this case or not.

And this is the situation I have. Mr. Vicente may want to add something else.

MR. VICENTE: I have nothing further to add, Your .Honor. That is precisely the case. We would be asking the Court. If the Court feels that the defendants in this case should be represented by counsel, we would be willing to entertain that request, but unless the Court allows us some time, and that - and when 1 say "us," Mr. Calderon and myself - to become familiar with the client, with the case, sufficiently to provide the defendants effective legal representation. Unless the Court gives us that time, we will not represent anybody. If the decision of the Court is that the defendants will not be granted that additional time, then we will just ask to be excused and the case may proceed as Your 'Honor deems appropriate. Thank you.

MR. GARCIA: May we be heard.

THE COURT: Mr. Garcia.

MR. GARCIA: We understand the difficult situation in which brother counsel have been placed by the requests made 'yesterday at the 11th hour by Mr. Unanue and Mrs. Unanue, Mrs. Unanue's counsel before the First Circuit, Mr. Brody. However, the Court needs to be aware of the fact that, as usual, these types of requests come at the 11th hour.

Mr. and Mrs. Unanue were both personally served with a copy of the order to show cause on October 24th, at approximately 4:00 p.m. That was last Tuesday.

Last Tuesday. It was not until yesterday, sometime in the afternoon or morning that they contacted counsel in Puerto Rico, Mr. Calderon and Mr. Vicente.

The order made very clear that the defendants were both required to appear personally before the Court to attend to this matter. The order also made clear that if they so wish, they could also attend represented by counsel.

We understand that it is important in proceedings like this to have counsel present. But at the same time, Your Honor, we feel that the gravity of the situation is such that the Court cannot grant the extension requested by not even defendants, but by counsel who are considering the possibility of representing the defendants in the case. Defendants are now on notice that the Court is looking to enforce the orders. They're now on notice that we ire aware of the sale of the apartment.

If the defendant; are granted any more time, they can do exactly the same thing that they did with the apartment at 625 Park Avenue; they can continue to sell other assets, thereby making those assets unavailable for the ultimate execution of the judgment, if and when the Court of Appeals for the First Circuit affirms the decision of this court.

What we have is only an indication by potential counsel that they're considering the representation. We don't even have a commitment that these two counsel present here today will actually commit and represent the defendants. We understand from our informal conversations with counsel that counsel do not even know the whereabouts of the defendants at this time. They were reached by telephone call yesterday, and they do not know whether the defendants are in Puerto Rico, in New York, or

even in the United States, for that matter.

In one of the telephone conferences that I had yesterday with Mr. Calderon, at least at that time he was under the impression that they were away from the United States, in Europe. We contacted Mr. Brody yesterday to inquire from him whether or not the defendants would appear and whether he would appear. As you may recall, Mr. Brody was admitted pro hac vice to represent them in this case.

Although Mr. Brody did not subsequently appear on behalf of Liliane during the proceedings in the case, particularly the trial of the case, he has been her counsel now for a number of years, perhaps dating back to 1988, and is her current counsel in the proceedings before the Court of Appeals for the First Circuit. In that capacity we sent Mr. Brody last week, on October 24th, the very same day that the defendants were both personally served with a copy of the order to show cause and the other documents, which led to the order to show cause, with a copy of all of the documents filed with respect to the order to show cause.

We asked Mr. Brody yesterday whether the defendants were in Puerto Rico and whether they would show up for the hearing. No, they are not going to show up to the hearing, and B, I am not authorized to tell you where they are, even if I knew where they were.

So the situation is, Your Honor, that we do not know where they are. All we know is that they're not here today, that they once again have decided voluntarily, and I suspect under the advice of counsel, not to attend the hearing today and show cause as the Court ordered them to do.

In these circumstances, Your Honor, we respectfully submit that.--

The one week postponement that I believe you're asking for, correct?

MR. CALDERON: Whatever reasonable period of time the Court feels is appropriate.

MR. GARCIA: We do not even have before us a commitment by brother counsel that they will bring the defendants to court. They have not even met with them. They don't even know who they are. They have to wait for a phone call from them to communicate with them. We don't think that the defendants have even tried to comply with the order of this court, and in those circumstances, we just don't feel that the requested adjournment of time is warranted. Unless you have any other questions, Your Honor?

THE COURT: The situation is this. I understand fully the position assumed by counsel Calderon, and Vicente, and if I were them, I would not do more than they are doing. Simply, they are in a situation whereby they have not decided whether they should assume a representation, and they were responsible enough to at least show their face in court and tell us what's going on That's as much as you can expect from them under the circumstances. I would not expect anything else.

But there is a problem here. The problem that I have here is that there was an order entered by this court regarding disposition of assets, and the order was violated. We're not talking about the sale of a car; we're talking about the sale of an apartment for over $4 million. It's a

major thing, and the papers on record show that these monies were taken out of the country. These monies were transferred to some account in Europe -- in Switzerland as a matter of fact. And under those circumstances, I would have expected the defendants, the defendants, with or without counsel, to appear here today.

This record is full of instances in which these defendants, out of disrespect for orderly proceedings before a court of justice or because of the fact that they were proceeding pro se in many various instances in which they appeared, the truth of the matter is that they have not complied with a number of dispositions. And under these circumstances, the only thing that I find prudent to do is one of two things. Either forget about it and not enforce the order and just assume that they are incapable of complying and forget about it, simply, or just have them arrested. And I think that there are only two alternatives, and the alternative of choice is the order. We're going to enforce orders of this Court and not allow these things to happen in this case, or any other case.

The only other alternative is to order their arrest. So what I will do is this. I will ask the, clerk of court to issue an arrest warrant against these two individuals. I will sign that order, and that order will be processed through the US Marshal's Service, who in turn will deliver this order to US Immigration authorities, US Customs; authorities, et cetera, and to the United States Marshal's Service, and in the Southern District of New York, and that will be it.

There will be no bail, no bail posted, and upon their arrest, these individuals should be transferred to this district, and then I will set •a hearing. This will give them the opportunity now of dealing with counsel and hiring local counsel, because the hearing won't be held today. I'm

just taking a preventive measure, basically to avoid further flouting of the orders of this Court. So that's exactly what I intend to do.

MR. GARCIA: Your Honor, there's something else. As part of the order to show cause that you entered in the case on October 16th, you lifted the stay of execution with respect to the other properties. The lifting of .the stay became effective.

THE COURT: The what became effective?

MR. GARCIA: The lifting of the stay with the other properties. So we have prepared a motion for execution of the judgment, particularly with respect to the penthouse B apartment at the Condominium San Geronimo, 86-I Ashford Avenue. We have the motion here, and we would be filing that, together with the order of execution and the draft of the writ for execution.

THE COURT: For the benefit of Mr. Calderon and Vicente, when I entered judgment in this case, I took the extraordinary measure, if you will, to basically protect the defendant's rights of not allowing the execution of the judgment, even though they were not posting bond, to stay the execution of judgment, waiting for the Court Of appeals to decide the issue. I became in essence their own lawyer in that sense, thinking that it would be a good thing to have the Court of Appeals express itself on these issues. Look what has happened. They have proceeded to turn around and sell the apartment. That is not an example of good faith. I cannot do anything other than order their arrest in these circumstances.

MR. GARCIA: In addition to that, Your Honor, we also served a request for production of documents and

information on the defendants, and we will be serving similar requests on third parties which we understand or who we understand aided and abetted the defendants in the violation of the order of this court.

THE COURT: Very well.

MR. CALDERON: So that we may inform these people in case they call again, are we to understand then that the plaintiff is proceeding with the execution of the judgment in spite of the fact that it is pending appeal?

THE COURT: The appeal has been argued. No decision has been rendered. I had stayed the execution, but in light of these circumstances, in light of the circumstance, I am proceeding with the execution because under federal law, if you don't post bond to stay the execution of judgment, even though the judgment is on appeal, can be executed.

MR. CALDERON: I just want to know what is the situation so that we can explain it to them.

THE COURT: The most explanation, Mr. Calderon, should be that if they are in Europe, with this arrest warranted, they're going to be extradited. If they are in the States, they won't be able to leave for Europe or anywhere else, because the US airports will know about the fact that there is an arrest warrant. If they are in Europe and they come back, they will be arrested upon arrival.

If a drug dealer cannot escape these consequences, I don't think they will either. It is very difficult in the modern world, the year 2000 kind of things, to avoid the effects of an arrest warrant of a federal court. And they should understand this.

MR. CALDERON: We will explain.

MR. GARCIA: If I can further explain to brother counsel.

THE COURT: Maybe now, maybe next month, maybe next year, but they're going to be caught and brought before me.

MR. GARCIA: At the time of the order to show cause presented by Your Honor, he lifted the stay, but he said if you post a bond of $4.6 million within three business days from the date that the order was served on - - personally on you, then we will continue the stay of execution of the judgment.

The three days expired on Friday, for which the lifting of the stay became effective yesterday, and that's why we're filing; the motion for execution of the judgment today with respect to the penthouse apartment at the Condominium San Geronimo, which is the one apartment that we have access to at the moment.

There is one other situation, Your Honor, that I will remind the Court about. And that is the situation with the Emperor Equities shares. If you may recall, when you entered the judgment and subsequently amended it, you ordered Mrs. Unanue, to file with the registry of the court the shares of Emperor Equities, the shares that she held. As you may remember, she is the 100 percent owner of that corporation, which is the sole owner of apartment 5A at the Condominium San Geronimo. Emperor was not a party to the cause, but Liliane Unanue was the sole owner of that property. She did not comply with that order either. What she did was file a motion advising the Court that the shares

had been lost after the Hurricane Georges in 1998, and because of that, she was not able to comply with the order of the Court.

At that point in time, Your Honor, since she is really the only owner, and the president and secretary of the corporation, what she should have done., and chose not to do, was to issue amended certificates of shares and deposit those with the court. But she did not do that. That is another instance of violation of the court order.

But again, that's not the only one. Your Honor may remember also the situation way back when the complaint was filed, when you ordered her to deposit with the court the proceeds of the sale of the Sutton House apartment in New York City, which were approximately $100,000 coming to her. That order was not complied with. The Court then entered a default by virtue of the fact that they had violated that order, and that's why the - that's one of the reasons that the case was heard without a jury, as a sanction for that particular order.

So we agree with Your Honor that the record is full of examples of violations of orders entered by the Court, and so we understand that the remedy of issuing the arrest warrant is really the only remedy at the moment, Your Honor, and we understand perfectly the situation which brother counsels are in.

THE COURT: Thank you very much. You're now excused. Good luck.

This is to be transcribed.

(End of proceedings.

EXHIBIT F

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

VS.

WARRANT FOR ARREST

ULPIANO UNANUE-CASAL
a/k/a CHARLES UNANUE

CASE NUMBER: CV. 95-2411 (JAF)

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest ULPIANO UNANUE-CASAL, a/k/a CHARLES UNANUE
(Name)

and bring him or her forthwith to the nearest magistrate to answer a(n)

[ ] Indictment [ ] Information [ ] Complaint

[ ] Order of court [X] CIVIL CONTEMPT - FAILURE TO APPEAR AT A HEARING. SEE ORDER #331, FILED ON OCTOBER 20, 2000. (ATTACHED)

charging him or her with (brief description of offense)

in violation of Title ____ United States Code, Section(s) ____

JOSE A. FUSTE
Name of Issuing Officer

U.S. DISTRICT JUDGE
Title of Issuing Officer

REBECCA AGOSTINI-VIANA
Signature of Deputy Clerk

OCTOBER 31, 2000, HATO REY, PUERTO RICO
Date and Location

Bail fixed at $ NO BAIL By REBECCA AGOSTINI VIANA
Name of Deputy Clerk

RETURN

This warrant was received and executed with the arrest of the above-named defendant at ____

DATE RECEIVED	NAME & TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE OF ARREST		

THE FOLLOWING IS FURNISHED FOR INFORMATION ONLY:

DEFENDANT'S NAME: ULPIANO UNANUE- CASAL ALIAS: CHARLES UNANUE

LAST KNOWN RESIDENCE: 360 EAST 57TH ST., APT. 12-A, NEW YORK, NY 10017

LAST KNOWN EMPLOYMENT: RETIRED

PLACE OF BIRTH: SAN JUAN, PUERTO RICO

DATE OF BIRTH: 08-22-22

PASSPORT NO. (1985-1993) D1857956 / (1986-1996) G1009755 / (1982-1987) C-966001

SOCIAL SECURITY NUMBER: 720-10-7230

HEIGHT: 5' 10" WEIGHT: 200

SEX: MALE RACE: WHITE

HAIR: BROWN (WHITENING) BALDING EYES: DARK

SCARS, TATTOOS, OTHER DISTINGUISHING MARKS:

FBI NUMBER:

COMPLETE DESCRIPTION OF AUTO:

INVESTIGATIVE AGENCY AND ADDRESS:

Certified to be a true and exact copy of the original.
FRANCES RIOS DE MORAN, CLERK
U.S. District Court for the District of Puerto Rico
By: _____ Deputy Clerk
Date: 10/3/1100

ADDITIONAL ADDRESSES

21 BIS, AVENUE D' IENA
PARIS, FRANCE

LA SOLANA DEL RIO
FUENGIROLA
MALAGA, SPAIN

860 ASHFORD AVENUE, APT. 11B or SA
SAN GERONIMO CONDOMINIUM
SAN JUAN, PUERTO RICO

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

EXHIBIT G

UNITED STATES OF AMERICA

VS.

LILIANE UNANUE

WARRANT FOR ARREST

CASE NUMBER: CV. 95-2411 (JAF)

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest LILIANE UNANUE
(Name)

and bring him or her forthwith to the nearest magistrate to answer a(n)

[ ] Indictment [ ] Information [ ] Complaint

[ ] Order of court [X] CIVIL CONTEMPT - FAILURE TO APPEAR AT A HEARING. SEE ORDER #331. FILED ON OCTOBER 20. 2000. (ATTACHED)

charging him or her with (brief description of offense)

in violation of Title ____ United States Code, Section(s) ____

JOSE A. FUSTE
Name of Issuing Officer

U.S. DISTRICT JUDGE
Title of Issuing Officer

REBECCA AGOSTINI-VIANA
Signature of Deputy Clerk

OCTOBER 31, 2000, HATO REY, PUERTO RICO
Date and Location

Bail fixed at $ NO BAIL

By REBECCA AGOSTINI VIANA
Name of Deputy Clerk

RETURN		
This warrant was received and executed with the arrest of the above-named defendant at		
DATE RECEIVED	NAME & TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE OF ARREST		

THE FOLLOWING IS FURNISHED FOR INFORMATION ONLY:

DEFENDANT'S NAME: LILIANE UNANUE ALIAS: LILIANE DASKALOVA

LAST KNOWN RESIDENCE: 360 EAST 57TH ST., APT. 12-A, NEW YORK, NY 10017

LAST KNOWN EMPLOYMENT: NOT EMPLOYED

PLACE OF BIRTH: SOFIA, BULGARIA

DATE OF BIRTH: 5-28-28 (PASSPORT SHOWS DATE OF BIRTH 5-28-38)

PASSPORT NO. 111462539

SOCIAL SECURITY NUMBER: 131-62-4046

HEIGHT: 5' 6" WEIGHT: 150

SEX: FEMALE RACE: WHITE

HAIR: BROWN EYES: DARK

SCARS, TATTOOS, OTHER DISTINGUISHING MARKS:

FBI NUMBER:

COMPLETE DESCRIPTION OF AUTO:

INVESTIGATIVE AGENCY AND ADDRESS:

I certify to be a true and exact copy of the original.
FRANCES RIOS DE MORAN, CLERK
U.S. District Court for the District of Puerto Rico
By: Deputy Clerk
Date: 8/3/00

IN THE UNITED 5TATES DISTRICT COURT
FOR THE DISTRICT or PUERTO RICO.

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

WRIT OF EXECUTION

THE UNITED STATES OF AMERICA
THE PRESIDENT OF THE UNITED STATES
THE COMMONWEALTH OF PUERTO RICO

To: The Special Master, Alberto Bacó Bagué, Esq., designated by the United States District Court for the District of Puerto Rico

WHEREAS, it appearing from the records of this Court that a Judgement was entered in favor of plaintiff Goya Foods, Inc. ("Goya") and against defendants Ulpiano Unanue-Casal a/k/a Charles Unanue ("Charles"), Liliane Unanue ("Liliane"') and Kalif Trading, Inc. ("Kalif Trading"), on October 31, 1997 (Docket No. .227), as amended on March 10, 1998 (Docket No. 245) and December 14, 1998 (Docket No. 275) (the "Judgment");

and

WHEREAS, it also appears from the records of this case that defendants have not satisfied any part of the Judgment, or the underlying judgment of the New Jersey Superior Court upon which this Court's Judgment was based; and

WHEREAS, there is no stay in effect which may affect the enforceability and execution of the Judgment, it is hereby:

1. ORDERED that Alberto Baco Bague, Esq. be and is hereby appointed Special Master to proceed forthwith with the public sale of the property located at 860 Ashford Avenue, Apartment 11B (or Penthouse B), San Juan, Puerto [sic], free and clear of all liens and encumbrances, to the highest bidder in order to make effective the Judgment held by Goya.

2. The property to be auctioned is more particularly described in the Spanish language as follows:

PROPIEDAD HORIZONTAL: Apartamento Numero 11-B. Local (penthouse) destinado a vivienda, todo de concreto armado y bloques de concreto, situado en la undecima planta del CONDOMINIO SAN GERONIMO, o sea, el edificio designado con el numero 860 de la Avenida Ashford, en el Sector del Condado, Municipio de San Juan. Tiene una area superficial de 2704 pies cuadrados, equivalentes a 251.00 metros cuadrados. Consta de salita de entrada, salcomedo, cocina, 4 habitaciones para dormitorios, 4 banos, vestidor, cocina, varios closets, corredor y terraza. Su puerta principal que da acceso y su puerta de servicio que da acceso a su corredor, se comunica con el vestibulo donde estan

localizados los ascensores y la escalera de salida al exterior. Colinda por el Norte, en una linea quebrada con patio exterior en una longitud de 56'3" equivalentes a 17.1400 metros; por el Sur, en una linea quebrada cone patio exterior in una longitud de 56'3" equivalentes a 17.1400 metros; por el Oeste con la pared que la separa del apartamento numero 11-A en una longitud de 26' equivalentes a 7.9248 metros con el vestibulo donde estan localizados los ascensores en una longitud de 8' equivalentes a 2.4384 metros con los acensores y el incinerador en una longitud de 20'6" equivaltntes a 6.2484 metros con el vestibulo donde estan localizados los ascensores en una longitud de 4' equivalentes a 1.2192 metros y con pared que las sepra del apartmento numer 11-A en una longitud de 29'6" equivalentes a 9.16 metros; y por el Este, en una linea quebrada con patio exterior a 26.7218 metros.

Le correspone un espacio de estacionamiento en el area designada a tales efectos.

PORCENTAJE: 2.7171% en los elementos comunes generales.

The above described property is registered in the Property Registry, San Juan Par, First Section, Property number 21337, at page 121 of Volume 592 of Santurce North.

3. ORDERED that the Clerk of the Court shall issue a Writ of Execution directign Alberto Bco Bague, Esq., Special Mastero, to make effective the Judgment awarded to Goya, together with the costs of these proceedings, through the sale of the foregoing property at a public sale in the manner set by law for the sale of realty by execution.

4. ORDERED that the public sale shall be held at the Office of the Clerk of this Court.

5. ORDERED that a Notice of said sale shall be published once a week for at least four (4) weeks prior to the date of the sale, in a newspaper having general circulation in the Commonwealth of Puerto Rico.

6. ORDERED that the Special Master shall only accept in payment of the auctioned property, currency of the United States or certified checks. In the event said property is sold and adjudicated to Goya, the amount of the bid made by Goya shall be deducted from the amount owed by defendant Charles Unanue to Goya pursuant tot he Judgment of the Superior Court of New Jersey dated February 23, 1995, and the amount owed by defendants pursuant to the Judgment of this Court, as amended, and only is said bid is greater than the money judgment awarded to Goya shall Goya be required to pay the difference in currency or by certified check.

7. ORDERED that the Special Master may, either Personally or by some person designated by him to act in his name, place or stead, and by his authority, adjourn the sale from time to time, without the need for further publication.

8. ORDERED that upon confirmation of the sale by this Court, the Special Master shall execute and deliver a deed of conveyance of the auctioned property, in the manner prescribed by law.

BY ORDER OF THE HONORABLE JOSE ANTONIO FUSTÉ, Judge of this
Court, given under my hand and seal on this 31st day of October, 2000.

Frances Rios de Morin
Clerk, U.S. District Court
for the District of Puerto Rico

By: _____
Deputy Clerk

12/15 OC K

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

RECEIVED & FILED
00 DEC -5 AM 7:52
U.S. DISTRICT COURT
SAN JUAN, P.R.

Soup Foods Inc.

VS.

Charle Unanue, etal.

CIVIL NO. 95-2411 (JAF)

DESCRIPTION OF MOTION

DATE FILED: 11/28/00 DOCKET: 337 TITLE: Emergency Motion etc

[] Plffs. [X] Defts.

O-R-D-E-R

Denied

12-5-00
DATE

JOSE A. FUSTE
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Goya Foods, Inc.

v

Ulpiano Unanue Casal, et al.

CIVIL CASE: 95-2413 (JAF)

DESCRIPTION OF MOTION

DATE FILED: 12/21/00	DOCKET #: 340	TITLE: MOTION by Liliane Unanue, pro se [to Vacate [336-1] order regarding writ of execution and appointment of special master]
BY: Defendant		

O-R-D-E-R

Denied

2/21/01
DATE

JOSE A. FUSTE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 01-1214

GOYA FOODS, INC.,
Plaintiff,Appellee
v.
ULPIANO UNANUE-CASEL,
a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

No. 01-1585

GOYA FOODS, INC.,
Plaintiff, Appellee
v.
LILIANE UNANUE,
Defendant, Appellant.

ULPIANO UNANUE-CASAL, a/k/a CHARLES UNANUE,
and KALIF TRADING INC.,
Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S District Judge]

Before

Boudin, Chief Judge,
Kravitch,* Circuit Judge,
and Lynch, Circuit Judge.

Jan Alan Brady with whom Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein was on brief for defendant Liliane Unanue.

Charles Unanue on brief pro se.

Ira Brad Matetsky, Legal Department, Goya Foods, Inc., with whom Arturo J. García-Solá and McConnell Valdés were on brief for plaintiff Goya Foods, Inc.

December 27, 2001

* Of the Eleventh Circuit, sitting by designation.

BOUDIN, Chief Judge. This appeal grows out of efforts by Goya Foods, Inc. ("Goya") to enforce a state court judgment against Charles Unanue and to reach certain of his assets held in the name of other parties including his wife Liliane. Prior history is recounted in Goya Foods, Inc. v. Unanue, 233 F.3d 38 (1st Cir. 2000) ("Goya I"), cert.. denied, 121 S.Ct. 1964 (2001). What follows is a brief history of the background and a summary of events since

Goya I.

In 1987, Goya sued Charles in New Jersey state court for breach of a settlement agreement governing an earlier dispute. While the state court suit was ongoing, Charles filed for bankruptcy in 1990 in Puerto Rico and the bankruptcy estate became a party to the New Jersey litigation. In February 1995, the New Jersey court entered a judgment against both Charles and his estate for $6.9 million. In re Unanue, No. M-128817, slip op. (N.J. Super.Ct. Ch. Div. Feb. 23, 1995). On September 12, 1995, the bankruptcy court dismissed Charles' bankruptcy case without granting him a discharge. In re Unanue-Casal, No. 90-04490, slip op. at 5 (Bankr. D.P.R. Sept. 12, 1995).

In November 1995, after the New Jersey judgment was entered, Goya filed an action in the federal district court in Puerto Rico against Charles, his wife, Liliane, and Kalif Trading (a Panamanian corporation organized by Charles), seeking to enforce the New Jersey judgment against certain assets nominally held by Liliane or Kalif. Included among these assets were cooperative shares in Apartment 10A, at 65 Park Avenue in New York City. Although the shares were titled in Liliane's name, Goya said Charles had paid the purchase price and maintenance fees on the apartment and was the true beneficial owner.

At the outset, Goya moved for provisional remedies to ensure its ability to collect any judgment it might obtain. Goya sought a prohibition on the alienation of certain properties held by Charles, Liliane and Kalif, including the shares in Apartment 10A. The district court granted the request on November 17, 1995. The order reads, in part:

> ORDERED that defendants, their agents, employees, and all persons holding property for

them or acting in concert with them, are prohibited from alienating or in any way assigning, transferring, selling or otherwise disposing or encumbering any of the real properties, including cooperative shares, listed below

. . . .

2. Apartment 10A at Park Avenue, New York, New York, cooperative shares pertaining to which are held in the name of Liliane Unanue.

The court issued a second order, similar to the first, specifically prohibiting alienation of the shares to Apartment 10A. That order reads:

ORDERED that defendant Liliane Unanue, her agents, employees, and all persons holding property for her or acting in concert with her, are prohibited from alienating or in any way assigning, transferring, selling or otherwise disposing or encumbering any of the cooperative shares pertaining to Apartment 10A at Park Avenue, New York, New York, or her ownership interest in the premises represented by such shares.

After denying the Unanues' motions to dismiss the suit for lack of personal jurisdiction the district court held a 10 day bench trial in July 1997 and issued its opinion on October 31, 1997. The court found that Liliane and Kalif Trading were holding properties for Charles and that Goya could execute against those properties. Goya Foods, Inc. v Unanue-Casal, 982 F. Supp. 103, 112 (D.P.R. 1997). It discussed, at some length, Apartment 10A, and ruled that Goya has a right "to execute judgment over . . . any

residence registered to [Liliane's] name . . . . Id. However, the court sua sponte stayed enforcement of the judgment pending Charles' appeal to this court and his appeal of the underlying state court judgment (even though the Unanues were not required to post a bond). Id.

The New Jersey appellate court subsequently affirmed the state judgment and the state supreme court denied further review. In re Unanue, 710 A.2d 1036, 1041 (App. Div.), cert. denied, 724 A.2d 801 (1998). In an opinion issued November 28, 2000, this court affirmed the Puerto Rico judgment, making clear that as to Liliane, the judgment reached only those properties at issue in the case. See Goya Foods, Inc., 233 F.3d at 45-46. The Supreme Court recently denied certiorari. 121 S.Ct. 1964 (2001).

However, in October 20)0, while the appeal of the Puerto Rico district court judgment was still pending before us, Goya discovered that the Unanues had secretly sold Apartment 10A in June 1998 for $4.6 million and had directed that $4.2 million of the sale price--apparently the balance after commissions--be wired to a Swiss bank account in Liliane's name. Goya claims both Charles and Liliane played integral roles in the sale.

When it learned of the sale, Goya filed an ex parte motion, on October 16, 2000, asking the district court for an order directing Charles and Liliane to appear in person and show cause why they should not be held in contempt of court. The court issued the show cause order on October 20, 2000. It reads:

> ORDERED that defendant Charles Unanue a/k/a Ulpiano Unanue Casal and defendant Liliane Unanue each shall APPEAR PERSONALLY BEFORE THIS COURT, together with counsel if they be so

> advised, on the 31st day of October, 2000, at 9:30 a.m. [in the United States Courthouse in Hato Rey, Puerto Rico] and then and there SHOW CAUSE why they should not be held in CONTEMPT OF COURT for their knowing and willful violation of the [November 17, 1995] Orders of this Court, and why the Court should not grant appropriate relief therefor . . .

The court emphasized that Charles and Liliane were to "APPEAR PERSONALLY" in court for the hearing, "such that an appropriate warrant for their arrest and detention shall issue upon their failure to appear as directed." The court also vacated the stay of execution it had placed on its judgment, effective October 27, 2000, unless Charles and Liliane deposited $4.6 million with the court or posted a bond. Further, the court granted Goya's request to conduct discovery regarding the details of the sale of Apartment 10A.

The Unanues were notified of the order on October 24, 2000, at their residence in New York City. Liliane's New Jersey attorney, Jan Brody, was also served with a copy. The Unanues, however, failed to appear at the scheduled hearing; instead, after receiving the show cause order, they apparently left New York for Paris. To this date, they remain fugitives; they have not appeared before the court, nor have they made any effort to pay the underlying judgment.

Two attorneys, whom the Unanues had contacted the day before the hearing, did appear at the hearing. They informed the court they had not yet decided whether to represent the couple and requested additional time to familiarize themselves with the case to make their decision.

The court responded:

> The problem that I have here is that there was an order entered by this court regarding disposition of assets, and the order was violated. We're not talking about the sale of a car; we re talking about the sale of an apartment for over $4 million. It's a major thing, and the papers on record show that these monies were transferred to some account in Europe . . . And under these circumstances, I would have expected the defendants . . . with or without counsel, to appear here today.
>
> This record is full of instances in which these defendants, out of disrespect for orderly proceedings before a court of justice or because of the fact that they were proceeding pro se in many various instances in which they appeared, the truth of the matter is that they have not complied with a number of dispositions. And under these circumstances, the only thing that I find prudent to do is one of two :things. Either forget about it and not enforce the order and just assume that they are incapable of complying and forget about it, simply, or just have them arrested. And I think there are only two alternatives, and the alternative of choice is the order. We're going to enforce orders of this Court and not allow these things to happen in this case, or any other case.
>
> The only other alternative is to order their arrest. So what I will do is this. I will ask the court to issue an arrest warrant against these two individuals. . . .

> There will be no bail, no bail posted, and upon their arrest, these individuals should be transferred to this district, and then I will set a hearing. This will give them the opportunity now of dealing with counsel and hiring local counsel, because the hearing won't be held today. I'm just taking a preventive measure, basically to avoid further flouting of the orders of this Court.

Thereupon, bench warrants were issued for the arrest of the Unanues.

The district court also granted Goya's motions, filed the day of the hearing, to execute judgment against another apartment located in San Juan, and to appoint a special master to conduct the sale of the property. In response, Charles and Liliane filed separate motions seeking to vacate all orders related to the contempt proceedings and execution of the judgment. Charles filed his motion, by mail, from France, on November 25, 2000. The court denied the motion on December 5, 2000, and on December 19, 2000, Charles filed his notice of appeal from that denial.

Liliane filed a similar motion to vacate, again, by mail from Europe, on December 18, 2003, captioned "Emergency Motion To Vacate Order of this Court for Ap[p]ointment of Special Master and To Vacate Warrant for Arrest of Liliane Unanue." The motion asked the court to rescind all orders requested by Goya subsequent to October 15, 2000. The court denied the motion on February 21, 2001, and, on March 19, 2000, Liliane filed a

notice of appeal from the denial.[2]

In their appeals, which have been consolidated, Charles and Liliane make virtually identical arguments. They claim the Puerto Rico federal court lacked subject matter jurisdiction over all proceedings in this case. They also claim the court lacked in personam jurisdiction over them in the original proceeding. As to the contempt hearing, they claim they were given insufficient notice. Lastly, they say that the district judge, who presided over all the matters in this long-running case, prejudged the contempt charge and should have recused himself.

At the outset Goya raises two threshold issues, asking this court to dismiss the appeals for want of a final appealable judgment or under the fugitive disentitlement doctrine. The question which, if any, of the district court's rulings is appealable now presents interesting questions. The Unanues purport to appeal from four or five different "orders" of the district court. But we need not determine which of these orders, if any, is final because we dismiss

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[2] On February 22, 2001, the district court ordered them to hand over the proceeds from the sale of Apartment 10A to Goya or to the court and granted the special master access to the Puerto Rico apartment. Goya also sought contempt sanctions against the buyer of Apartment 10A, the management company, and the apartment cooperative which approved the sale, asserting that these parties were aware that the sale violated the district court's orders prohibiting alienation. After holding a show cause hearing, the district court held the three parties in contempt and ordered them to pay Goya $4.6 million, plus interest and attorneys fees. Goya Foods, Inc. v. Unanue-Casal, No. 386, 2001 WL 505305 (D.P.R. May 4, 2001). An appeal from that decision has been filed.

the Unanues' appeals under the fugitive disentitlement doctrine.

There is substantial precedent for dismissing an appeal by one who has fled, Walsh v. Walsh, 221 F.3d 204, 214 (1st Cir. 2000) (collecting cases), cert. denied, 531 U.S. 1159 (2001), even where the appeal is taken from a :civil judgment.[3] But the doctrine is also discretionary rather than automatic and to be applied with caution. Notably, in Degen, the Supreme Court found that a civil forfeiture suit should not be dismissed merely because the defendant was in flight from a different albeit connected criminal prosecution, and it focused attention on practical considerations particular to the case rather than abstract concerns about court dignity or future deterrence. 517 U.S. at 825-29.

In our own case, several considerations warrant dismissal of the appeals. First, the underlying conduct with which we are concerned is extremely serious. The charge is that, in the teeth of explicit orders prohibiting Charles and Liliane from transferring the shares, both of them connived at violating the orders, enriched themselves by $4.2 million, and then fled the jurisdiction. When instructed to return and defend their actions, they refused to do so. This is not, in short, some garden variety discovery dispute but--so far as appears--blatant defiance of explicit court orders.

Second, the appellants' flight is not from some other

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[3] United States v. Barnette, 129 F.3d 1179, 1186 (11th .Cir. 1997); Empire Blue Cross &Blue Shield v. Finkelstein, 111 F.3d 278, 282 (2d Cir. 1997); see also Degen v. United States, 517 U.S. 820, 823 (1996); Walsh, 221 F.3d at 215.

proceeding, as in Degen, raising the specter that dismissal of the civil appeal is being used to coerce appearance in the criminal case. Here, the flight grows directly out of Goya's effort to enforce its judgment in the civil proceeding which consumed years of litigation; and the appeal is from actions and orders of the district court designed to enforce that very judgment. Indeed, the flight prevents Goya from discovery that might be used to unearth the proceeds of the sale or otherwise enforce its judgment. Empire Blue Cross & Blue Shield, 111 F3d at 282.

Third, on the most practical level, the appeals are themselves little more than devices to frustrate and delay the enforcement of the original judgment. In general, appellants' main arguments are without merit; indeed, several were made unavailingly in the original action and are now clearly barred by the law of the case. Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997). The only effect of the appeals is to raise the cost for Goya of implementing the judgement, to consume the district court's time, and to provide a vehicle for seeking stays which would further delay Goya's recovery if this court were naive enough to grant.. them. See Barnette, 129 F.3d at 1185-86.

Lastly, flight in this instance is unfortunately not some novel and eccentric event but is of a piece with the conduct of the appellants over a lengthy period. Charles' concealment of assets has a long and distressing history, and Liliane has abetted him, inter alia, by making factual claims as to the origin of the assets that were flatly rejected by the district court as false or unsupported. Goya Foods, Inc., 982 F. Supp. at 103. The violation of explicit orders of the court and the flight to avoid the show cause hearing are only the latest in this series of evasions.

The appellants argue against the doctrine but unpersuasively. They say, for example, that Apartment 10A has not left the jurisdiction and that Goya has pursued other parties (e.g., the buyer of the apartment) for identical amounts. But, of course, the shares in Liliane's hands were the least costly means to realize on the apartment's value, see Barnette, 129 F.3d at 1183, and others who benefitted or assisted may have good-faith defenses. And the very cost to Goya of pursuing others, when the shares were subject to an order in favor of Goya, is itself harm. See Walsh, 221 F.3d at 215.

Goya has filed a motion for an award of costs against Liliane Unanue and her counsel (Jan Allen Brody, Esq. and the Carella Byrne firm) in the amount of no less than $7,500. See 28 U.S.C. §§ 1912, 1927; Fed. R. App. P. 38 (if a court determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee). Goya asserts that its actual expenses have been substantially in excess of this amount but seeks at least token compensation for having to file a lengthy brief addressed to arguments, a number of which are clearly frivolous.

Two such arguments serve as examples. The first is the claim that the district court lacked jurisdiction ab initio because the underlying New Jersey state court judgment was not properly validated in Puerto Rico. In particular, the Unanues say the court failed to hold an exequator proceeding, as required under Puerto Rico law. Ex parte Marquez Estrella, 128 D.P.R. 243 (P.R. 1991).

This claim is identical to one made and flatly rejected in Goya I. Our decision in that case states, in no uncertain terms, that the exequator objection does not go to the court's subject matter jurisdiction. Goya I, 233 F.3d at 47.

Further, we held that the Unanues had forfeited the claim because they had not made it in a timely fashion before the district court. Id. at 46. There is no excuse for resurrecting the argument now in an appeal from a subsequent enforcement action.

The Unanues also claim the district judge, who presided over the proceedings from the outset, should have recused himself because he prejudged the contempt charges against them. 28 U.S.C. § 455(a) (1994). As a basis for the claim, they cite the judge's comments at the show cause hearing that "there was an order entered by this court regarding this disposition of assets, and that order was violated." The district judge proceeded to hold that the "record is full of instances in which these defendants, out of disregard for orderly proceedings before a court of justice . . . has not complied with a number of dispositions." The Unanues say these comments, made at the conclusion of the show cause hearing, demonstrate pre-judgment of the contempt charge.

It is well-settled that a judge who expresses preliminary views inside the court, based upon knowledge acquired in court proceedings, is not recusable. Liteky v. United States, 510 U.S. 540, 550-51 (1994); In re Boston Children's First, 244 F.3d 164, 169 n.9 (1st Cir. 2001); United States v. Gordon, 634 F.2d 639, 641 (1st Cir. 1980). This is so plainly settled that the request for recusal is frivolous on the facts of this case. What is more, the request was clearly forfeited; it was never made before the district court and appears, for the first time, in Liliane's brief filed nearly eight months after the show cause hearing was held. United States v. DiPina, 230 F 3d 477, 486 (1st Cir. 2000)

Under these circumstances, we conclude that an award of $7,500 in costs against Jan Alan Brody and the Carella Byrne firm is amply justified in favor of Goya. Normally,

we would not assess even such modest costs based upon the characterization of an individual argument or two, see, Kowalski v. Gagne, 914 F.2d 299, 309 (1st Cir. 1990); but the two examples given are extreme and taken with other attempts to reargue matters previously decided or forfeited or otherwise hopeless appear to us to warrant the modest award in question in this instance. Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1580 (Fed. Cir. 1991); Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192, 1200 (7th Cir. 1987)

Accordingly, it is ordered that the appeals be dismissed based on the fugitive disentitlement doctrine and that Jan Alan Brody and the Carella Byrne firm pay to Goya $7,500 additional costs. The award of additional costs will run only against counsel, there being no indication that Liliane Unanue was either a lawyer or a party to the selection of arguments.

Accordingly, the appeal is dismissed and the motion for costs is granted.

United States Court of Appeals
For the First Circuit

No. 01-1214

GOYA FOODS, INC.,
Plaintiff,Appellee
v.
ULPIANO UNANUE-CASEL,
a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

No. 01-1585

GOYA FOODS, INC.,
Plaintiff, Appellee
v.
LILIANE UNANUE,
Defendant, Appellant.

ULPIANO UNANUE-CASAL, a/k/a CHARLES UNANUE,
and KALIF TRADING INC.,
Defendants.

JUDGMENT

Entered: December 27, 2001

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico,

and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows:

The appeal is dismissed and the motion for costs is granted.

By The Court:
RICHARD CUSHING
DONOVAN, Clerk

JULIE GREGG
By:_____
Appeals Attorney

[cc: Jan Brody, Esq., A rturo Garcia-Sola, Esq.,
Ira Matetsky, Esq., IL Upiano Unanue Casal]

United States Court of Appeals
For the First Circuit

No. 01-1585

GOYA FOODS, INC.,
Plaintiff, Appellee
v.
LILIANE UNANUE,
Defendant, Appellant.

ULPIANO UNANUE-CASAL, a/k/a CHARLES UNANUE,
and KALIF TRADING INC.,
Defendants.

ORDER OF COURT

Before

BOUDIN, Chief Judge
SELYA, KRAVTICH,* LYNCH, LIPEZ, Circuit Judges

Entered: June 4, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

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* of the Eleventh Circuit, sitting by designation

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By The Court:
RICHARD CUSHING
DONOVAN, Clerk

JANICE M. O'NEIL
By:_____
Chief Deputy Clerk

[cc: Jan Brody, Esq., Arturo Garcia-Sola,] Esq., Beth Webber, Esq., Regan Shulman, Esq., Ira Matetsky, Esq., Ulpiano Unanue Casal, Maria Emilia Pico, Esq., Eva Coben Talel, Esq.,]

United States Court of Appeals
For the First Circuit

No. 01-1214

GOYA FOODS, INC.,
Plaintiff,Appellee
v.
ULPIANO UNANUE-CASEL,
a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

ORDER OF COURT

Before

BOUDIN. Chief Judge
SELYA, KRAVTICH,* LYNCH, LIPEZ, Circuit Judges

Entered: June 4, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the

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* of the Eleventh Circuit, sitting by designation

suggestion for rehearing en banc, be denied.

By The Court:
RICHARD CUSHING
DONOVAN, Clerk
JANICE M. O'NEIL
By:_____
Chief Deputy Clerk

[cc: Jan Brody, Esq., Arturo Garcia-Sola, Esq.,
Ira Matetsky, Esq., Ulpiano Unanue Casal]

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provision:

U.S. Const. amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offences to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statute:

28 U.S.C.A. § 455(a):

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.